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THE PARTHENOGENESIS OF WIGMORE: A HUMBLE HISTORY OF HOW A CONFIDENTIALITY REQUIREMENT AROSE EX NIHILO TO BECOME THE SINE QUA NON OF ATTORNEY-CLIENT PRIVILEGE

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This Article represents the expansion of a single paragraph in a previous article into a more thorough history of Wigmore's greatest trick of all, the creation of a now pervasive legal doctrine out of thin air. *See* Jared S. Sunshine, *Failing to Keep the Cat in the Bag: A Decennial Assessment of Federal Rule of Evidence 502's Impact on Forfeiture of Legal Privilege under Customary Waiver Doctrine*, 68 CLEV. ST. L. REV. 637, 646-47 (2020) (quoted *infra* notes 16-22) [hereinafter Sunshine, Failing to Keep the Cat in the Bag]. All translations of Latin and Italian text hereafter are those of this author, who humbly begs forgiveness for any errors apparent to those more skilled.

> There is no fuller or better discussion of the subject of privileged communication between lawyer and client than in Dean Wigmore's treatise on evidence. . . . No summary of his arguments will do them justice, and I accordingly incorporate by reference his entire statement of the case for and against the privilege. The book is generally available. It is inconceivable that where there are lawyers there is no copy of Wigmore. Chi non ha Wigmoro, non vada al foro.[1]
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> The attorney-client privilege has become one of the most complex and therefore, litigated privileges. This is due, in significant part, to the difficulties created by the concept of confidentiality. From the creation and preservation of the privilege, to the development of the facts to prove the legitimacy of the claim, the requirement of confidentiality has created time-consuming and costly responsibilities for both litigants and judges. In addition, confidentiality has been interpreted as imposing a superfluous secrecy requirement that has generated conflicting decisions and practices.
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> The concept of confidentiality and secrecy was literally made up by Wigmore in the first edition of his treatise.[2]

I. INTRODUCTION

There is a rather famous fresco on the dome of American Capitol rotunda entitled The Apotheosis of Washington, depicting George Washington, the general and then first president of the nation, being admitted into the firmament by the deities Victory and Liberty, surrounded by the Olympian gods demonstrating the accomplishments of the nation in their respective spheres.[3] Neptune, for example, symbolizes America's maritime power, with Venus at hand laying the first transatlantic telegraph cable; Vulcan likewise mechanical industry; Ceres, Flora, and Pomona, agriculture; Mercury, commerce; and Minerva, the sciences.[4] This last goddess is syncretized with Athena in the Greek pantheon, whose greatest temple was the still-extant Parthenon of

1. Max Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CALIF. L. REV. 487, 490 n.11 (1928) (brackets in quotation omitted). Loosely translated, Radin's rhyming couplet in Italian reads: "If you don't have Wigmore, don't go to court." This author feels obligated to add retrospectively as to Radin's use of "inconceivable": "VIZZINI: He didn't fall? Inconceivable! / INIGO: (whirling on Vizzini) You keep using that word—I do not think it means what you think it means." THE PRINCESS BRIDE (Act III Communications et al. 1987); *see also* WILLIAM GOLDMAN, THE PRINCESS BRIDE 106-08 (30th anniv. ed. 2007).

2. Paul R. Rice, *Attorney-Client Privilege: Continuing Confusion about Attorney Communications, Drafts, Pre-Existing Documents, and the Source of the Facts Communicated*, 48 AM. U. L. REV. 967, 968 & n.5 (1999) [hereinafter Rice, Continuing Confusion].

3. *See* OFFICE OF THE SECRETARY OF THE SENATE, THE UNITED STATES CONGRESS & CAPITOL: A WALKING TOUR HANDBOOK 54 (U.S. Sen. 1999); *see also* CHARLES B. REYNOLDS, WASHINGTON: THE NATIONAL'S CAPITAL 31 (B.S. Reynolds Co. 2d ed. 1921) (providing descriptions and illustrations).

4. *Id*.

Athens, named after her appellation *Parthenos*, a reference to her perennial virginity.[5] Perhaps in *Parthenos*, there is also some allusion to Athena's birth, as she was said to have sprung fully formed and armed for war from the head of her father, Zeus.[6]

Like Athena's nativity, parthenogenesis refers straightforwardly to the biological phenomenon of "[r]eproduction without concourse of opposite sexes or union of sexual elements," figuring in Charles Darwin's Origin of Species to describe this rather non-evolutionary method of procreation.[7] The law is no stranger to the similarities between evolutionary biology and the development of the law.[8] Indeed, judges have understood legal parthenogenesis to be the invocation of a new doctrine ex nihilo as the non-evolutionary product of a jurist's mind rather than the evolutionary accumulation of precedent.[9] The concept seems to have proven particularly salient where the unprecedented development diverges sharply from all that went before, as with one court observing with confusion that "with every sign from that [Supreme] Court pointing in the diametrically opposite direction, one gropes to understand by what strange process of parthenogenesis or genetic mutation the notion ever sprang up. The genealogy is bizarre."[10] Or as another panel of the same appellate court wrote in 2005 of a similarly unprovenanced innovation, "it is unquestionably nothing more than a wish-fulfillment fantasy, ideational parthenogenesis, a product of spontaneous combustion—like Athena springing fully armed from the brow of Zeus."[11]

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5. *See* Louise Anne May, *Above Her Sex: The Enigma of the Athena Parthenos*, in 3 VISIBLE RELIGION 106, 111 (Leiden, Netherlands, E.J. Brill Publ. 1984); *see also* THOMAS BULFINCH, THE AGE OF FABLE OR, BEAUTIES OF MYTHOLOGY 18, 149-50 (Boston, George C. Rand & Avery 1855).

6. *See* May, *supra* note 5, at 110; *see also* BULFINCH, *supra* note 5, at 18.

7. OXFORD ENGLISH DICTIONARY 1278, *parthenogenesis*, noun sense 1 (Oxford Univ. Press 2d ed. (compact) 1989) (citing Darwin's usage of 1859).

8. *See* Jared S. Sunshine, *A Lazarus Taxon in South Carolina: A Natural History of National Fraternities' Respondeat Superior Liability for Hazing*, 5 CHARLOTTE L. REV. 79, 118-119 (2014).

9. *See*, *e.g.,* Lovelace v. Leechburg Area Sch. Dist., 310 F. Supp. 579, 585-86 (W.D. Pa. 1970) ("We believe there is not, unless it can be derived (like contraception) by the process of cerebral parthenogenesis from primeval darkness and a vague constitutional continuum without form and void. This task should not be performed by a court of first instance." (citation omitted)); *see also* Arcoren v. Peters, 811 F.2d 392, 398-99 (8th Cir. 1987) ("However, we are convinced that our decision in Allison was not an innovation produced by a process of 'cerebral parthenogenesis,' but a logical interpretation derived from careful scrutiny of the language and legislative history of the statute." (quoting Lovelace)); *cf.* U.S. v. Gregg, 829 F.2d 1430, 1439 n.19 (8th Cir. 1987) ("A verdict of guilty under a proper instruction requiring proof of a certain element of the offense does not supply or create, as if by automatic parthenogenesis, the necessary evidence to prove that element of the offense. Such evidence must be contained in the record."); Schmitt v. Maryland, 779 A.2d 1004, 1019 (Md. Ct. Spec. App. 2001) ("[T]he public usage almost certainly remains that someone else must provide a defendant with an alibi. He does not, by some sort of exculpatory parthenogenesis, produce one for himself.").

10. Tabbs v. Maryland, 43 Md. App. 20, 39 (Md. Ct. Spec. App. 1979).

11. Adams v. Maryland, 885 A.2d 833, 870 (Md. Ct. Spec. App. 2005).

Such nomenclature, "ideational parthenogenesis," well describes a prominent invention in the law of privilege by John Henry Wigmore, undoubtedly the most eminent writer on the Anglo-Saxon law of evidence by virtue of his seminal Treatise on the System of Evidence in Trials at Common Law first published in 1904 to 1905.[12] Prior to Wigmore, there was little hint that attorney-client communications had to be zealously guarded as secret in order to maintain their protections.[13] But Wigmore fabricated just such a requirement of confidentiality, as this author has previously written:[14]

> Yet the provenance of that most thorny condition for privilege, confidentiality, is decidedly obscure prior to Wigmore.[15] What historical evidence exists anent confidentiality in attorney-client communications suggests it was a weapon in the hands of clients, intended to allow them to compel counsel to protect their secrets, rather than a latent landmine waiting to obliterate their privilege at the casual slip of a tongue.[16] No less an authority than Paul R. Rice has observed that it seems to have sprung Athena-like fully formed[17] from the head of Dean Wigmore himself, establishing itself by virtue of the Dean's preeminence rather than doctrinal underpinnings or legal precedent.[18] This is consistent with the 1924 observation that "[w]hen the first edition was published, it was only possible to judge of Mr. Wigmore's book as a statement of the law. During the intervening years it has become something greater. It has created law."[19] Indeed, "once he had perpetrated a doctrine on the basis of little or

12. JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (Boston, Little, Brown & Co. 1905).

13. *See infra* Section II-C.

14. Jared S. Sunshine, *Failing to Keep the Cat in the Bag: A Decennial Assessment of Federal Rule of Evidence 502's Impact on Forfeiture of Legal Privilege under Customary Waiver Doctrine*, 68 CLEV, ST. L. REV. 637, 646-47 (2020) (internal citations preserved).

15. *See* Michael Correll, *The Troubling Ambition of Federal Rule of Evidence 502(d)*, 77 MO. L. REV. 1031, 1034-35 (2012); *see also* Rice, *Continuing Confusion*, *supra* note 2, at 968 nn.2-5; PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 6:3 (Thomson Reuters ed. 2018) [hereinafter RICE, *ACPITUS*].

16. Paul R. Rice, *Attorney Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853, 868-72 (1998) [hereinafter Rice, *Eroding Concept*]; *see* Jared S. Sunshine, *Clients, Counsel, and Spouses: Case Studies at the Uncertain Junction of the Attorney-Client and Marital Privileges*, 81 ALB. L. REV. 489, 547-48 (2017) (citing Geoffrey C. Hazard Jr., *An Historical Perspective on the Lawyer-Client Privilege*, 66 CALIF. L. REV. 1061, 1071-72 (1978); and Max Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CALIF. L. REV. 487, 487 (1928)); Jared S. Sunshine, *Seeking Common Sense for the Common Law of Common Interest in the D.C. Circuit*, 65 CATH. U. L. REV. 833, 834-35 (2016) (discussing Hazard and Radin articles at length); Correll, *supra* note 15, at 1035-37; Rice, *Continuing Confusion*, *supra* note 2, at 968.

17. *See* THOMAS BULFINCH, BULFINCH'S MYTHOLOGY 7, 107 (1913).

18. *See* Rice, *Continuing Confusion*, *supra* note 2, at 968 & n.5 ("The concept of confidentiality and secrecy was literally made up by Wigmore in the first edition of his treatise."); *see also* Rice, *Eroding Concept*, *supra* note 16, at 861-63; RICE, *ACPITUS*, *supra* note 15; *see also* Sunshine, *Uncertain Junction*, *supra* note 16, at 547; Correll, *supra* note 15, at 1035-36.

19. Zechariah Chafee Jr., *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 37 HARV. L. REV. 513, 521 (1924) (book review) (cited in Edward J. Imwinkelried, *Introduction to the Treatise: The New Wigmore in Perspective*, *in* THE

> no authority, precedents would soon follow to fill the gap."[20] Thus by the latter half of the twentieth century, the requirement of confidentiality was well established as a prerequisite for privilege.[21]

What follows is an attempt to coax from the vagaries and vapors of history some explanation of just how Wigmore managed this magic trick. The attorney-client privilege has been recognized in some form since well before the days of Cicero under the Roman Republic,[22] and thus there is ample fodder for analysis. Section II takes up the prehistory of privilege before Wigmore, tracing its evolution and rationale from the jurisprudence of Rome through early English common law and its development in Great Britain, and surveying the breadth of the nineteenth century treatises immediately preceding Wigmore and their treatment of confidentiality. Section III turns to the architect of American privilege law himself, providing a brief biography relevant to his work and a sketch of how Wigmore's magnum opus came to be, before descending into the details of how Wigmore conjured a requirement of confidentiality ex nihilo. In Section IV, the Article briefly recapitulates some of the criticisms and difficulties that Wigmore's parthenogenesis has occasioned, albeit erring on the side of concision given so many able authors have gone before.[23] The conclusion returns to the genius of Wigmore and argues that, however murky the basis of his invention and thorny the difficulties it has occasioned, Wigmore's triumphs immeasurably outweigh what was a minor if meddlesome misstep in the development of the law. The man is fundamentally blameless in the matter, having acted on his conscience and reason, adjudged under the circumstances of his times. But modernity ought to shed any unreasoned obsequiousness to such an eminence and inter at last a misstep that has only become apparent since those long-ago times.

NEW WIGMORE: A TREATISE ON EVIDENCE (3d ed. 2019)).

20. WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE 111 (1985) (cited in Edward J. Imwinkelried, *Introduction to the Treatise: The New Wigmore in Perspective*, *in* THE NEW WIGMORE: A TREATISE ON EVIDENCE (3d ed. 2019)).

21. Correll, *supra* note 15, at 1037-38; *see* RICE, *ACPITUS*, *supra* note 15 ("By 1950 Wigmore's rule on confidentiality appears to have taken hold.").

22. *See* Radin, *supra* note 1, at 488; ABEL HENDY JONES GREENIDGE, THE LEGAL PROCEDURE OF CICERO'S TIME 484 (Clarendon Press 1901) (describing the evidentiary protections afforded Roman *patroni* or "patrons"—as counsel were called—in respect of their clients); *cf.* EDWARD P. WEEKS & CHARLES THEODORE BOONE, A TREATISE ON ATTORNEYS AND COUNSELLORS AT LAW §§ 4-5, at 5-7 (San Francisco, Bancroft-Whitney Co. 2d ed. 1892) (1878) [hereinafter WEEKS] (summarizing the role of the *patroni causarum* and other classes of advocate in Roman law).

23. *See, e.g.*, Correll, *supra* note 15, at 1031-32; Rice, *Continuing Confusion*, *supra* note 2, at 967, 968 nn.2-5; Rice, *Eroding Concept*, *supra* note 16, at 861-63; Geoffrey C. Hazard Jr., *An Historical Perspective on the Lawyer-Client Privilege*, 66 CALIF. L. REV. 1061, 1071-72 (1978); James A. Gardner, *A Re-Evaluation of the Attorney-Client Privilege (Part I),* 8 VILL. L. REV. 279 (1963); David W. Louisell, *Confidentiality, Conformity and Confusion: Privilege in Federal Courts Today*, 31 TUL. L. REV. 101 (1956); Radin *supra* note 1, at 487.

II. A SECONDARY PREHISTORY OF ATTORNEY-CLIENT PRIVILEGE

Predictably, likely the most cited source on the history of attorney-client privilege prior to Wigmore is Wigmore himself,[24] whose rendition might be expected to favor his discovery of uncompromising confidentiality as a requirement for privilege. Commendably, it does not: Wigmore appears content to have baldly invented the precept from thin air, or at least disinclined to make his invention seem less bald.[25] A searching prehistory of the attorney-client privilege, with emphasis on its basis and the role of confidentiality—supported in many places by Wigmore's scholarship and that of the eminent legal historians Edward Weeks[26] and David Drysdale,[27] amongst others[28]—is necessary foundation for understanding the breadth of Wigmore's parthenogenesis. This prehistory differs perhaps from others in focusing upon secondary rather than primary sources, for the salient question here is how scholars viewed the state of the law rather than recitation of the opinions themselves of the early courts that so often required exegeses to achieve some measure of consistency.[29]

A. Evolution of the Rationale and Scope of Privilege

The prehistory of the law of privilege may be divided into three distinct periods separated by time and rationale: its origins in the Roman Republic and Empire, its assimilation in the common law of England as a license afforded to the attorney, and its evolution in Great Britain into a protection under the prerogative of the client.

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24. *See, e.g.*, John William Gergacz, *Attorney-Corporate Client Privilege*, 37 BUS. LAW. 461, 473 n.57 (1982).

25. WIGMORE, *supra* note 12, § 2311, at 3233-35.

26. *See* WEEKS, *supra* note 22, §§ 142-143, at 295-304.

27. *See* David Drysdale, *Chapter 1: History of the Attorney-Client Privilege*, *in* PAUL R. RICE ET AL., ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 1 (Thomson Reuters ed. 2019) [hereinafter *Drysdale's History*]; David Drysdale, *Requirement of Confidentiality and Its Premise*, *in* PAUL R. RICE ET AL., ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 6:3 (Thomson Reuters ed. 2019) [hereinafter *Drysdale on Confidentiality*].

28. *See* Radin, *supra* note 1; Hazard, *supra* note 23.

29. *See* JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 4 (Boston, Little, Brown & Co. 1898) ("From the diversity and multitude of the casual rulings by the judges,—rulings often hastily made, ill-considered, and wrong,—from the endeavor to follow these as precedents and to generalize and theorize upon them, from the forgetting by some courts, in making this attempt, of the accidental and empirical nature of much in these determinations, and the remembering of this fact by others, there has resulted plenty of confusion."). Should an exhaustive and punctilious survey of the inconsistencies of the cases themselves be desired, Drysdale's is without compare. *See Drysdale's History*, *supra* note 27.

1. Privilege's Origins in the Roman Republic and Empire

Legal advocates as such are not attested before the rise of Rome, though the precursors to the profession were known in Hellenic Athens.[30] Rome had its lawyers, but law under the Republic was hostile to restrictions upon evidence such as that an attorney-client privilege would impose.[31] Inadmissibility was particularly disfavored in civil procedure, for "such rules, although they may be necessary to protect an ignorant jury . . . , were hardly required for a Roman judex or recuperatores. It was better that they should hear all, even the reported statement of an unsworn man, and draw their own conclusions."[32] Criminal trials before juries, however, erected some few bulwarks, albeit of a less rigid nature than procedures under the Empire.[33] For some grave public offenses such as extortion,[34] defense counsel was made incompetent to render testimony, as illustrated in the Ciceronian oration In Verrem.[35] This seems

30. *See* WEEKS, *supra* note 22, § 2, at 2 ("Among the Athenians it does not appear that there was any distinct class of men whose peculiar office it was to speak on behalf of parties in courts of justice."); *see also* James K. Gaynor, *Law Through the Ages*, 14 S. TEX. L.R. 147, 153-54 (1972) (noting an informal set of advisors).

31. *See* JOHN THOMAS ABDY, HISTORICAL SKETCH OF CIVIL PROCEDURE AMONG THE ROMANS 109 (Cambridge, Macmillan & Co. 1857) ("[T]he intention of the Roman lawyers was to facilitate to the utmost the admission of evidence, rather than to attempt in any way, by too narrowly sifting it, to favour its exclusion."); *see also* GREENIDGE, *supra* note 22, at 273-74 (speaking of Ciceronian practice).

32. GREENIDGE, *supra* note 22, at 274.

33. *Compare id.* at 482 ("The regulations as to who might or should give evidence cannot be perfectly illustrated for the Ciceronian period, and it would be rash to attribute to this epoch all the rules of the later Roman law."), *with* ABDY, *supra* note 31, at 125-27 (discussing later practice and noting some differences). *But compare* Gaynor, *supra* note 30, at 160 (finding there were "virtually no rules of evidence" in criminal trials too); *with* 1 SAMUEL MARCH PHILLIPPS, ESEK COWEN, & NICHOLAS HILL JR., A TREATISE ON THE LAW OF EVIDENCE 148 (New York, Gould, Banks & Co. 2d American ed. 1843) (1814) [hereinafter PHILLIPPS AM. 2D] ("The Roman law will appear, in the foregoing regulations, to have been too narrow and restrictive on the question of incompetency.").

34. Although titled "extortion" by long usage, the Roman court *quaestio de repetundis* overseeing "extortion" had within its bailiwick cases of executive corruption and embezzlement, the notion being that any so transgressing used the power of his office to compel—that is, to extort—the emoluments he obtained. Such prosecutions increased after the *lex Acilia repetundarum* of 122 BC, which (besides excluding counsel as a witness, *see infra* note 35) subjected senators to charges of extortion tried before a jury including the lesser knightly class of the *equites*, in large part to combat corruption by senators serving as provincial governors. *See* ALLAN CHESTER JOHNSON, PAUL COLEMAN-NORTON & FRANK CARD BOURNE, ANCIENT ROMAN STATUTES 38-46 (U. Tex. 1961) (introducing and translating the *lex Acilia*), www.droitromain.univ-grenoble-alpes.fr/Anglica/acilia_johnson.html [perma.cc/NBN7-NCKP]; GREENIDGE, *supra* note 22, at 418-22.

35. *See* MARCUS TULLIUS CICERO, *In Verrem*, *in* 1 ORATIONES WITH A COMMENTARY 186 (George Long annot., London, Whitaker & Co. 2d ed. 1862) ("Quid Lucullus, qui tum in Macedonia fuit, melius haec cognovit quam tu, Hortensi [Verres's counsel], qui Romae fuisti? . . . nonne te mihi testem in hoc crimine eripuit non istius innocentia sed legis exceptio?"); Radin, *supra* note 1, at 488 (discussing *In Verrem* and *citing* GREENIDGE, *supra* note 22, at 484). Long's notes to Cicero add helpfully that "[t]he Lex under which

an especial application of the Roman legal maxim "nullus idoneus testis in re sua intelligitur,"[36] viz. that none is deemed a proper witness in his own cause.[37] Stated elsewhere more generally, the parties' respective counsel were privileged from being compelled to bear witness.[38] Indeed, some evidence suggests this bar to involuntary testimony reached beyond the case at hand should a client be tried in a different court on another charge.[39] Even before the birth of Christ, therefore, the rudiments of privilege had emerged — rooted not at all in objective confidentiality but in the position counsel occupied.[40] As went the reasoning: "to compel a citizen to divulge a secret and thereby breach a moral duty is wrong."[41]

The great scholar of Roman jurisprudence Max Radin[42] advances a further theorem: that counsel's incompetence to testify arose by analogy to a slave's in cases involving his master.[43] So intrinsic was the slave's disability at Roman law that even in non-criminal cases the testimony of slaves was verboten.[44] By some lights, the entire household of the accused

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Verres was being prosecuted [for extortion] excluded a 'patronus' from being a witness." CICERO, *supra*; *see* JOHNSON, COLEMAN-NORTON & BOURNE, *supra* note 34, ¶ 16.

36. This maxim, although no longer applicable today, has survived in legal Latin to the modern era. *Nullus idoneus testis in re sua intelligitur*, BLACK'S LAW DICTIONARY (11th ed. 2015); *Nullus idoneus testis in re sua intelligitur*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969). It may even be found in the earliest America cases, albeit in admiralty. *E.g.*, Clarke v. The Dodge Healy, 5 F. Cas. 949, 951 (C.C. E.D. Pa. 1827) (Washington, J.) (describing as a maxim of civil law, equity, admiralty, and common law alike); Spurr v. Pearson, 22 F. Cas. 1011, 1012 (C.C. D. Mass. 1816) (Story, J.) (describing it as a maxim of the civil law and consistent with the common law).

37. *See* ABDY, *supra* note 31, at 126 (citing the maxim to explain why testimony was precluded from "every person who had any direct interest in the cause, whether parties to the suit, or not"); PHILLIPPS AM. 2D, *supra* note 33, at 147 (citing as principle of Roman evidentiary law); *see also* JOHNSON, COLEMAN-NORTON & BOURNE, *supra* note 34, ¶ 16 (excluding also freed slaves of the accused).

38. Daniel W. Shuman, *The Origins of the Physician-Patient Privilege and Professional Secret*, 39 SW. L.J. 661, 667 (1985); GREENIDGE, *supra* note 22, at 484 ("The relationship of client and patron, in the loose form in which it prevailed in Cicero's time, was also a bar to compulsory testimony."); *see* Radin, *supra* note 1, at 488 ("Advocates equally from very ancient times could not be called as witnesses against their clients while the case was in progress.").

39. *See* GREENIDGE, *supra* note 22, at 484.

40. *See id.*; Shuman, *supra* note 38, at 667; Radin, *supra* note 1, at 487-89; *see also* ABDY. *supra* note 31, at 126.

41. Shuman, *supra* note 38, at 667.

42. *See* William O. Douglas, *Max Radin*, 36 CALIF. L. REV. 163 (1948); *see also* A. M. Kidd, *Max Radin*, 38 CALIF. L. REV. 795 (1950).

43. *See* Radin, *supra* note 1, at 487-89; *see also* Shuman, *supra* note 38, at 667 (citing Radin).

44. *See* Shuman, *supra* note 38, at 667; Radin, *supra* note 11, at 487-88; JAMES LEIGH STRACHAN-DAVIDSON, PROBLEMS OF THE ROMAN CRIMINAL LAW 126-28 (Clarendon Press 1912) (criminal procedure) [hereinafter STRACHAN-DAVIDSON]; GREENIDGE, *supra* note 22, at 391 n.1, 394 n.1 (noting general bar to compelled testimony from the accused's slaves); *id.* at 273 ("The sole qualification for a witness in civil procedure was that he should be a free man."). There seem peculiar exceptions to this supposedly inviolable rule, including that for cases of *incestum,* but the authorities agree these exceptions prove, rather than refute, the rule. *See, e.g.*, Shuman, *supra* note 38, at 667 n.23.

was privileged from testimony, or at least certain relations.[45] Radin reasons that, just as slaves or other members of the household, the testimony of counsel would be "valueless either for or against a litigant" as either biased by affiliation or "unworthy of belief" should he repudiate his sworn duties to his client.[46] Roman law, *arguendo*, accordingly came to recognize the corollary that "the advocate had both the privilege of refusing testimony and the duty to refuse it."[47] There remain difficulties with Radin's neat ætiology, of which but one is that slaves' testimony was permitted in *favor* of their master should they persevere despite the tortures to which they were put.[48] Nor is the premise unassailable, for Weeks too espies an analogy, but now it is the patron who fills the role of master and the client that of slave.[49] This theorem of origin, albeit thought-provoking, has not been verified in antiquity; what remains is the observed practice that counsel were privileged from testimony.[50]

Radin adds more concretely that under the Empire, "advocates and attorneys (agents) were made completely incompetent as witnesses in the case in which they acted" by imperial decree.[51] He refers to the towering *Corpus Juris Civilis* of Justinian I in its precept that "*ne patroni in causa, cui patrocinium praestiterunt, testimonium decant*," *viz.* that no attorneys should give testimony in a cause where they acted as counsel.[52] By this time, moreover, the implicit rationale for this longstanding rule had become explicit: "[t]he Roman Law rejected the evidence of . . . the advocate, in nearly the same cases in which the common law holds them incompetent; but not for the same reason . . . [but] because of the identity

45. *See* Radin, *supra* note 11, at 488; GREENIDGE, *supra* note 22, at 483; ABDY. *supra* note 31, at 127.

46. Radin, *supra* note 1, at 488-89.

47. *Id.* at 489; *see* Shuman, *supra* note 38, at 667.

48. *See* STRACHAN-DAVIDSON, *supra* note 44, at 126-27. The reference to torture is not metaphorical; before a slave might bear witness, he *had* to undergo corporal torture to test the truth of his words. *Id.*; *e.g.*, *id.* at 113.

49. WEEKS, *supra* note 22, § 333, at 663-64 (discussing *patroni* and clients at Roman law and concluding that "[t]he relation which existed between them was similar to that of parent and child, or rather that of master and slave").

50. *See* sources cited *supra* note 38.

51. Radin, *supra* note 1, at 488; *see also id.* at 489 (citing *supra* note 47).

52. *See, e.g.*, Bolton v. Corp. of Liverpool, (1833) 1 Myl. & K. 88, 39 Eng. Rep. 614 (Ch.) (quoted in 1 SIMON GREENLEAF & ISAAC A. REDFIELD, A TREATISE ON THE LAW OF EVIDENCE § 240, at 271-72 n.7 (Boston, Little, Brown & Co. 12th ed. 1866) (1842) [hereinafter GREENLEAF 12TH]) ("The civil law, in deed, considered the advocate and client so identified or bound together, that the advocate was, I believe, generally not allowed to be a witness for the client. '*Ne patroni in causa, cui patrocinium præstiterunt, testimonium dicant*,' says the Digest."); *accord* Potter v. Inhabitants of Ware, 55 Mass. 519, 520 (1848) ("It was a rule of the Roman law, that judges should take care that advocates be not allowed as witnesses: *Mandatis cavetur, ut præsides attendant, ne patroni in causa, cui patrocinium præstiterunt, testimonium dicant*. Dig. 22, 5, 25. The reason, as Professor Greenleaf remarks, was, that the Roman law seemed to consider advocates 'as not credible, because of the identity of their interest, opinions, and prejudices with those of their clients.'"). These cite the twenty-second tractate of the Digest of Justinian, which may be found readily today at www.thelatinlibrary.com/justinian/digest22.shtml [perma.cc/BH5U-GLMM].

of their interest, opinions, and prejudices, with those of their clients."[53] This of course is only a restatement of the particular application of *nullus idoneus* noted above: if there is identity of client and counsel, the latter can no more be credited in his own cause than the former.[54]

Yet in the later Empire, and surely as of the *Corpus* of AD 529-534, juries had fallen into desuetude and magistrates had become both inquisitors and decisors of their cases.[55] Indeed, the whole Roman system of law disappeared from western Europe in the fall of the Western Empire in AD 476 at the swords of the Germanic tribes.[56] Only with the rediscovery of the long-lost *Corpus* in twelfth century Amalfi was the study of Roman law revived, leading ultimately to the Napoleonic Code of 1804, a "Roman law adapted to the life and times of the French people," which code in turn formed the foundation of most civil law jurisdictions.[57] In England alone, where a "strong, native common law" had already sprung, did substantive Roman law did not prevail.[58] Ironically, however, it was English common law trials that more resembled those of Cicero's day in employing an accusatorial rather than inquisitorial system, whereunder the court acts as a neutral arbiter of accuser and accused, rather than an examiner charged with exacting the truth on its own.[59] Likely the earliest English jury trials were closer yet to Cicero's, with the jurors "usually personally familiar with the facts of the case" and active participants.[60] But much separated Roman from English practice as the latter evolved: whereas a English judge came to regulate the trial and testimony of witnesses, the Ciceronian judge had largely deferred to the opposing parties.[61] "Under such circumstances," observes James Strachan-Davidson, another noted scholar of Roman jurisprudence, "no 'Law of Evidence' could practically grow up."[62]

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53. GREENLEAF 12TH, *supra* note 52, § 238, at 268 n.2; *see* sources cited *infra* note 42.

54. *See supra* notes 35-39.

55. *See* STRACHAN-DAVIDSON, *supra* note 44, at 158-65 (describing in detail the evolution from jury trial under the Republic to a fully inquisitorial system under the Empire); *id.* at 125-26 (quoted *infra* note 62); *see also* Gaynor, *supra* note 30, at 160.

56. *See* Gaynor, *supra* note 30, at 158; Joseph W. Planck, *The Survival of Roman Law*, 51 A.B.A. J. 259, 259-60 (1965).

57. Planck, *supra* note 56, at 260-61; *see* Gaynor, *supra* note 30, at 182-83; *see also* Shuman, *supra* note 38, at 679-80. The term "civil law" refers to its derivation from the *Corpus Juris Civilis*, and only inconveniently happens to be the same name as the branch of the common law contrasted with the criminal code. To be sure, there are analogues to attorney-client privilege in civil law jurisdictions, *see, e.g.*, *id.* at 678-85; Radin, *supra* note 1, at 496-97, but as the Anglo-American tradition that Wigmore interpreted is that of the common law — as specified in the very title of his book — this Article does not examine them further.

58. Planck, *supra* note 56, at 259.

59. *See* STRACHAN-DAVIDSON, *supra* note 44, at 112 & n.3.

60. *Drysdale's History*, *supra* note 27, § 1:2 & nn.10-11.

61. *See* STRACHAN-DAVIDSON, *supra* note 44, at 121-125 (discussing discrepancies between British and Roman approach to the evidence of witnesses).

62. *Id.* at 125. Strachan-Davidson adds that "in the system which under the Principate superseded the *publica judicia*, the judge had a freer hand . . . But it was then too late for any Law of Evidence; for the accusatorial system was giving way to the

2. Privilege in England as the Attorney's Point of Honor

It was, therefore, under English common law that attorney-client privilege first reached full blossom.[63] Whether the Roman rule was directly assimilated or provided support indirectly must remain uncertain, though likely there is some of both.[64] Multiple sources place the privilege's recurrence in the long reign of Elizabeth I in the sixteenth century,[65] "where it already appears unquestioned," according to Wigmore[66] — though the later legal historian Geoffrey C. Hazard Jr. questions how unquestioned it truly was.[67] Although hardly proving the point, Wigmore adds that the privilege could scarcely date earlier, for only in the Elizabethan era did compulsory process to secure testimony evolve.[68] Agreeing fully with neither, Drysdale details that privilege followed from such compulsion, for as the jury became a disinterested panel, and the parties in interest were thought incredible (recall the maxim of *nullus idoneus*[69]), the availability of testimony from counsel would have been prejudicially dispositive.[70] Blackstone, meanwhile, praises the ancient English provenance of the attorney-client trust whilst

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inquisitorial, and this latter brooks no restraints on the arbitrary discretion of the judge as to his methods for arriving at the truth." *Id.* at 125-26.

63. *See* WIGMORE, *supra* note 12, § 2290, at 3193-94.

64. *Compare* Shuman, *supra* note 38, at 670 ("Did the common law's recognition of an attorney-client privilege spring forth independent of Roman law and its earlier recognition of an attorney-client privilege? One can answer this question, if at all, only through educated guesswork."); *and* Radin, *supra* note 1, at 489 ("That the Roman precedent was the origin of the English rule as far as attorneys are concerned, cannot be proved."), *with* Bolton v. Corp. of Liverpool, (1833) 1 Myl. & K. 88, 39 Eng. Rep. 614 (Ch.) (discussing Roman law as analogue to British privilege).

65. *E.g.*, Shuman, *supra* note 38, at 670; *Drysdale's History*, *supra* note 27, § 1:2 & n.20; Hazard, *supra* note 23, at 1070 (averring that "Elizabethan cases do indeed refer to the privilege" although dating reported cases to the latter half of the seventeenth century); A. Kenneth Pye, *Fundamentals of the Attorney-Client Privilege*, PRAC. L., Nov. 1969, at 15, 16; WIGMORE, *supra* note 12, § 2290 at 3193-34 & n.1.

66. WIGMORE, *supra* note 12, § 2290, at 3193.

67. Hazard, *supra* note 23, at 1070 ("But beyond this, the historical foundations of the privilege are not as firm as the tenor of Wigmore's language suggests. On the contrary, recognition of the privilege was slow and halting until after 1800."). As shall be seen, Hazard disputes quite a good lot on the history of the attorney-client privilege and features regularly as a straw man to be refuted in Drysdale's *History*. *See Drysdale's History*, *supra* note 27, § 1:2 n.19, 1:4 nn.1-2 & 7, § 1:6 n.3 & 5, § 1:12 n.1. Drysdale has his own foibles, however, placing enormous (not to say undeserved) faith in a singular history of English law by Sir William Holdsworth. *See generally* 9 SIR WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW (1926); *e.g.*, *Drysdale's History*, *supra* note 27, § 1:4 n.1 (preferring Sir William's account over Hazard's). That the truth may prevail, this Article allows them both their say.

68. WIGMORE, *supra* note 12, § 2290, at 3194; *accord Drysdale's History*, *supra* note 27, § 1:2 & nn.16-17; *see also* Shuman, *supra* note 38, at 669.

69. *See supra* notes 36-37; *see also Drysdale's History*, *supra* note 27, § 1:2 & n.18 ("But, by this time, the parties were considered unfit to testify.").

70. *Drysdale's History*, *supra* note 27, § 1:2 & nn.17-19.

primly critiquing the nominal disallowance of counsel in cases of felony and treason until William III.[71] This exclusion was surely more honored in the breach than the observance,[72] however, as judges agreed with Blackstone that English jurisprudence supposed the right to counsel and so "seldom scruple[d] to allow a prisoner counsel to stand by him at the bar, and instruct him what questions to ask, or even to ask questions for him, with respect to matters of fact."[73]

From its earliest days, the law rendered such counsel incompetent to testify in the suit at bar: "[i]n England, where an attorney acts as *advocate* in a legal proceeding, he has been precluded altogether from giving any evidence."[74] Such a formulation still echoes the Roman rules and Latin maxims cited *ante*.[75] But Wigmore and Radin instead locate the English rule's rationale in the *pundonor*[76] of the barrister,[77] *viz.* that as such lawyers "were gentlemen almost *virtute officii*," their honor would be unacceptably compromised in being haled into testimony.[78] Hazard relatedly suggests that barristers, as members of the court, could no more be put to the question than their brethren on the bench.[79] Although these

71. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 349 (Clarendon Press 1770) ("A rule, which . . . seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law. For upon what face of reason can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass? Nor indeed is it strictly speaking a part of our antient law: for the *Mirror*, having observed the necessity of counsel in civil suits, 'who know how to forward and defend the cause, by the rules of law and customs of the realm,' immediately afterwards subjoins; 'and more necessary are they for defence [sic] upon indictments and appeals of felony, than upon other venial causes.'"); *see* WEEKS, *supra* note 22, § 14, at 19-22 (discussing Blackstone and the availability of counsel).

72. *See* WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET, PRINCE OF DENMARK, act 1, sc. 4. Although pointing the reader in the proper direction, this author refuses to mark as quotation those *bon mots* of the Bard that have become common parlance.

73. BLACKSTONE, *supra* note 71, at 349-50.

74. WEEKS, *supra* note 22, § 143, at 300 (citing Stone v. Byron, 16 Law. J. Q. B. 32, 4 Dowl. 62; L. 393; Dunn v. Packwood, 1 B. C. R. 312, 11 Jur. 242; Pearce v. Pearce, 16 L. J. Ch. 157); *see also id.* § 142, at 295-96, & n.2 ("Professional communications made by a client to his counsel are to be excluded from the jury upon grounds of public policy, because greater mischiefs would probably result from requiring or permitting their admission than from wholly rejecting them.").

75. *See supra* notes 36-37, 51-53.

76. This word, as the italic case may suggest, is a now obsolescent abbreviation by way of Spain of the phrase "point of honor," for the brevity of which this author is mindful. Radin employs it without reproach, and so, it is to be hoped, does this Article.

77. As to the distinctions amongst barristers, solicitors, counsel, attorneys, and other genres of lawyers that ultimately prove irrelevant to this Article, see *Drysdale's History*, *supra* note 27, § 1:4 ("Barristers, attorneys, and solicitors"); WEEKS, *supra* note 22, §§ 14-21, at 19-34.

78. Radin, *supra* note 1, at 487; *accord* WIGMORE, *supra* note 12, § 2290, at 3194; *see id.* § 2286, at 3187-88 (discussing the privilege of a gentleman's point of honor more generally); *see also Drysdale's History*, *supra* note 27, § 1:3 & n.1 (acknowledging the *pundonor* basis).

79. Hazard, *supra* note 23, at 1071. Although Hazard's point is well-taken, that a judge might be called to testify was not quite so unthinkable at early law as is implied. *See* 2 JOHN PITT TAYLOR, A TREATISE ON THE LAW OF EVIDENCE AS ADMINISTERED IN ENGLAND

bases elide less rarefied counsel,[80] Radin explains "there was at least an equally old and powerful feeling that required a similar reticence on the part of attorney or solicitor," for they too held positions of the most punctilious trust and could not honorably be expected to violate that loyalty.[81] Drysdale, too, finds the honor of any lawyer protected.[82] "The reality," he says, "is that the privilege was given no more effect when it was invoked by 'counsel' than when it was invoked by attorneys or solicitors,"[83] and there is "no apparent support" in the case law for any disparity.[84] Only because barristers were so connected to the litigation context to which privilege was then restricted might the privilege have seemed theirs alone; in fact, any lawyer advising on a case enjoyed the same point of honor to demur from testimony in it.[85]

As in Rome, therefore, English lawyers (of any species) had the privilege to refuse testimony — and the onus to do so.[86] This privilege was wholly that of the lawyer, obliged as he was by honor and duty both.[87] It

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AND IRELAND § 1244, at 1054-55 (London, W. Maxwell 2d ed. 1855) (1848) [hereinafter TAYLOR 2D]. Drysdale, as usual, does not think Hazard's point is well-taken, for he observes that barristers were not *officers* of the court as were attorneys. *Drysdale's History*, *supra* note 27, § 1:4 n.1.

80. *See Drysdale's History*, *supra* note 27, § 1:4 & n.2 ("If this were true, one would think that barristers' communications with their clients would usually have been privileged, whereas other legal advisers (such as solicitors, attorneys, and scriveners) would have had less recourse to this privilege. There is, however, no apparent support for that surmise in the case law.").

81. Radin, *supra* note 1, at 487 ("A servant must keep his master's secrets, and however honored and influential a servant, an attorney was for a long time definitely in that class and kept something of that standing.").

82. *See Drysdale's History*, *supra* note 27, § 1:3 & n.1 ("The privilege was seen as protecting the honor of the legal advisor, who owed a duty of secrecy to his client and, consequently, ought not be compelled to reveal the client's secrets.").

83. *Id.* & n.3. Drysdale adds, committed as he is to the irreparably inconsistent case law, that there is no basis to surmise a difference between classes of attorneys in the opinions. *Id.* & n.2. He wisely observes, however, that differences likely arise in the cases because of the different functions lawyers perform, *id.* & nn.4-7, duplicating in very similar words Hazard's view. *See* Hazard, *supra* note 23, at 1071.

84. *Id.* & n.2, nn.4-6.

85. *Id.* ("Therefore, while it may have appeared that the privilege originated with barristers, a closer examination of the case law (especially that of the sixteenth century) reveals that the privilege applied to all lawyers — barristers, attorneys, and solicitors.").

86. *Compare* Radin, *supra* note 1, at 493 (describing of English counsel that "[i]t is both a privilege proper, *i.e.*, in refusing disclosure, the lawyer is violating no one's right; — but it is also a duty, that is, he owes to his client the duty to refuse"), *with id.* at 489 (describing the parallel privilege and duty in Rome, quoted *supra* note 47).

87. *See* Pye, *supra* note 65, at 16 ("Originally, the privilege seemed to be based upon the honor of the attorney and belonged to the attorney, who could waive it."); Hazard, *supra* note 23, at 1070 (noting that "some of the early cases express the idea that the privilege was that of the lawyer" because "a gentlemen does not give away matters confided to him"); Radin, *supra* note 1, at 493; WIGMORE, *supra* note 12, § 2290, at 3194 ("Clearly the attorney and the barrister are under a solemn pledge of secrecy, not less binding because it is implied and seldom expressed. 'The first duty of an attorney,' it has been said, 'is to keep the secrets of his clients.'" (quoting Taylor v. Blacklow, (1836) 3 Bingh. N.C. 249 (KB) (Gaselee, J.))).

protected not the secrecy of the communications as such, but the principle that a counsellor ought not be made to bear witness against his client, creating a dilemma with no honorable answer.[88] Vested so in the attorney, one unmoved by duty or honor (perish the thought) might decline the privilege at his own whim.[89] It would be overmuch to say the client had *nothing* to do with it — a client would presumably not long maintain such counsel — but he did not have much.[90] This privilege stemmed not from the security of the client's confidentiality, but of the security due the esteemed legal profession and its practitioners.[91] Or, to paraphrase a periphrasis of Roman law, it was not seen meet to require an honorable citizen to betray a duly laid trust.[92]

Wigmore relates that recognition of testimonial privilege rooted in the *pundonor* flourished in the 1600s, and "[b]y the middle of the 1700s it seemed as though this notion would prevail."[93] Hazard, however, disputes this efflorescence as far as the attorney-client privilege, finding courts equivocal if not downright skeptical.[94] The earliest cases do evince some heterogeneity of result,[95] though they also reveal not only advocates but ordinary attorneys availing of the privilege.[96] Drysdale's review, albeit noting some variances and omissions, demonstrates the latter too: lawyers of every stripe could assert their own honorable privilege.[97] But Hazard's suggestion that the attorney-client privilege itself was "nearly wiped out" by the celebrated *Annesley v. Anglesea*[98] of 1743 can only be

88. *See Drysdale's History*, *supra* note 27, § 1:3 & n.1 (quoted *supra* note 82); WIGMORE, *supra* note 12, § 2286 at 3187-88 ("In the trials of the 1600s, the obligations of honor among gentlemen (and the English bench and bar were peculiarly dominated by that standard) were often put forward as a sufficient ground for maintaining silence. The same point of view is also plain at that time in the treatment of the privilege for attorney and client, which was then supposed to rest upon the honorable obligations of the attorney, rather than upon objective considerations of policy"); *see also* Hazard, *supra* note 23, at 1070 ("It is also true that in order to prevent disclosure, the law must prohibit it, for otherwise the lawyer would be governed by the general rule that a witness must give evidence of facts within his knowledge.").

89. *See* Pye, *supra* note 65, at 16; Radin, *supra* note 1, at 493; WIGMORE, *supra* note 12, § 2290, at 3196; *see also Drysdale's History*, *supra* note 27, § 1:3 & n.7 ("When held to be the legal advisor's privilege, it could be waived by him, although the oath of secrecy still remained."). The term "decline" rather than "waive" is used deliberately in the main text, to avoid importation of the ramified superstructure of waiver that would arise under Wigmore.

90. *See, e.g.*, WIGMORE, *supra* note 12, § 2290, at 3195 ("In the first place, under the original theory, the privilege did not at all exempt the client himself. The pledge of secrecy had not been taken by him, and therefore the 'point of honor' was not his to make.").

91. *See supra* note 82; *see also* sources cited *supra* notes 86-90.

92. *See supra* note 41 and accompanying text.

93. WIGMORE, *supra* note 12, § 2286, at 3187-89.

94. Hazard, *supra* note 23, at 1071-80.

95. *See id.* at 1070-73.

96. *See id.* at 1071 nn.40-41.

97. *See Drysdale's History*, *supra* note 27, § 1:4.

98. Annesley v. Anglesea, (1743) 17 How. St. Trials 1139 (KB). As the case is detailed in Wigmore, Hazard, and elsewhere, its circumstances need not be elaborated, though they make for lurid reading. *See, e.g.*, Hazard, *supra* note 23, at 1073-80;

arrant hyperbole, as his own discussion shows.[99]

On the other hand, the *pundonor* doctrine was wiped out in the inauspicious year (for Britons)[100] of 1776 in the *Duchess of Kingston's Case*.[101] There the House of Lords confronted a *pundonor* interposed by the Viscount Barrington as to exchanges with the Duchess of Kingston, who stood accused of bigamy.[102] After deliberation, the Lords overruled Barrington, following the views of Lord Camden and the Duke of Richmond, and directed the viscount to answer.[103] The following year it was held at King's Bench that "the wisdom of the law knows nothing of that point of honor," a meteoric fall for a once-dominant theory.[104] "Doubtless the attorney's exemption would have fallen at the same time with the others of like origin," writes Wigmore, "had not a new theory, ample to sustain and even to enlarge it, by that time come to be recognized."[105]

3. Privilege in Great Britain as the Client's Protection[106]

This new theory had arisen by the early eighteenth century and viewed privilege not as based in the attorney's pundonor but from the

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WIGMORE, *supra* note 12, § 2291 at 3197; 3 WILLIAM OLDNALL RUSSELL, HORACE SMITH & ALBERT PERCIVAL PERCEVAL KEEP, A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS 587-88 n.*(g)* (London, Stevens & Son 6th ed. 1896) (1819) [hereinafter RUSSELL 6TH].

99. Hazard, *supra* note 23, at 1073; *see id.* at 1073-80; *see also infra* notes 119-122 (discussing *Annesley* further).

100. *See, e.g.*, THE DECLARATION OF INDEPENDENCE (U.S. 1776).

101. *Drysdale's History*, *supra* note 27, § 1:3 & n.3 (discussing *Duchess of Kingston's Case*, (1776) 20 How. St. Tr. 586 (HL)); WIGMORE, *supra* note 12, § 2286, at 3188-89 (discussing and quoting *Kingston*); *see also id.* § 2290, at 3194 (describing concomitant end in attorney-client context).

102. WIGMORE, *supra* note 12, § 2286, at 3188-89 (discussing *Kingston*).

103. *Id.* (discussing *Kingston*). Camden, erstwhile Lord Chancellor from 1766 to 1770 and later Earl Camden, had pronounced before the House that "the laws of this land — I speak it boldly in this grave assembly — are to receive another answer from those who are called to depose at your bar, than to be told that in point of honor and of conscience they do not think that they acquit themselves like persons of that description when they declare what they know." *Id.* (quoting *Kingston*, 20 How. St. Tr. 586).

104. *Id.* at 3189 (quoting *Hill's Trial*, (1777) 20 How. St. Tr. 1362 (KB)); *see also* TAYLOR 2D, *supra* note 79, § 1245, at 1072 (noting a peer must take the oath as witness on pain of contempt and cannot rely upon a protestation of honor).

105. *Id.* § 2290, at 3194.

106. As this new theory had arisen roughly around the time that England was transmuted into Great Britain by its union with Scotland in 1707, it is convenient to relabel the nation in which the privilege continued to evolve. *See* TREATY OF UNION OF THE TWO KINGDOMS OF SCOTLAND AND ENGLAND, art. 1 (July 22, 1706) ("That the Two Kingdoms of Scotland and England, shall upon the 1st May next ensuing the date hereof, and forever after, be United into One Kingdom by the Name of GREAT BRITAIN."), www.scotshistoryonline.co.uk/union.html [perma.cc/DFW5-N7T7]; Union with England Act 1707 c.7, www.legislation.gov.uk/aosp/1707/7/contents [perma.cc/239V-7B86]; Union with Scotland Act 1706, c.11 www.legislation.gov.uk/aep/Ann/6/11/contents [perma.cc/F6EJ-JHCF].

client's interest in safely securing legal advice.[107] Wigmore explains that it "looked to the necessity of providing subjectively for the client's freedom of apprehension in consulting his legal adviser and proposed to assure this by removing the risk of disclosure by the attorney even at the hands of the law."[108] Hazard essays a number of seventeenth and eighteenth century cases seemingly advancing the newfangled theory, a good lot of which were unsuccessful.[109] Of particular moment are *Spark v. Middleton*[110] in 1664 and *Radcliffe v. Fursman* in 1730.[111] In *Spark*, the court allowed counsel's objection to being sworn to answer questions generally regarding his client, for "he should only reveal such things as he either knew before he was Counsel, or that came to his knowledge since by other persons."[112] But in *Radcliffe*, the House of Lords overruled a similar objection that attorney-client communications are "intended for private instruction and information only, in order to direct parties in the conduct of their affairs. . . . no counsellor or attorney can be obliged, or ought to discover any matter which his client reveals to him."[113] Drysdale, to be sure, essays further than does Hazard,[114] but agrees *Radcliffe* signaled a particularly pivotal moment that would limit privilege law "for the next 140 years."[115] On its authority, written correspondence from the client (as opposed to counsel's advice) was often held discoverable,[116] unless specifically connected to an ongoing suit,[117] although as will be discussed later, that exception grew in time to swallow the harsher rule.[118]

And, of course, in *Annesley v. Anglesea* in 1743, the Earl of Anglesea's attorney of twenty years was made to testify despite a lucid invocation of the new theory of privilege:[119]

> As to the client, the interest which he has in the privilege, is very obvious. No man can conduct any of his affairs which relate to matters of law, without employing and consulting with an attorney; even if he is capable of

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107. *See* Pye, *supra* note 65, at 16; WIGMORE, *supra* note 12, § 2290, at 3194-95.

108. WIGMORE, *supra* note 12, § 2290, at 3194.

109. Hazard, *supra* note 23, at 1071-73.

110. Spark v. Middleton, (1664) 1 Keb. 505, 83 Eng. Rep. 1079 (KB).

111. Radcliffe v. Fursman, (1730) 2 Bro. P.C. 514, 1 Eng. Rep. 1101 (HL).

112. *Spark*, 1 Keb. at 505, 83 Eng. Rep. at 1079 (quoted and discussed in Hazard, *supra* note 23, at 1072).

113. *Radcliffe*, 2 Bro. P.C. at 516, 517 (quoted and discussed in Hazard, *supra* note 23, at 1073).

114. *See Drysdale's History*, *supra* note 27, §§ 1:6-1:8.

115. *Id.* § 1:6 & n.5.

116. *Id.* § 1:7.

117. *Id.* § 1:8 & n.1 ("But not all written communications from a client to his legal advisor were discoverable during this period. Confidential communications between a client and his legal advisor that took place in the progress of a suit were considered privileged communications.").

118. *Id.* & nn.2-3 ("This exception to the obligation under a bill of discovery to disclose everything known or believed in relation to the matter in question was gradually expanded during the first decades of the nineteenth century."); *see infra* notes 139-150.

119. Annesley v. Anglesea, (1743) 17 How. St. Trials 1139 (KB).

> doing it in point of skill, the law will not let him; and if he does not fully and candidly disclose everything that is in his mind, which he apprehends may be in the least relative to the affair he consults his attorney upon, it will be impossible for the attorney properly to serve him: therefore to permit an attorney, whenever he thinks fit, to betray that confidence . . . would be of the most dangerous consequence, not only to the particular client concerned, but to every other man who is or may be a client.[120]

All the same, the Lord Chief Baron Bowes thought the secrets in question did not pertain to legal concerns, which outstripped the ordinary rule that attorney-client communications be protected.[121] (As vivid example, Lord Anglesea had allegedly remarked to his counsel he would gladly give ten thousand pounds to see his rival hanged, a markedly extralegal undertaking.[122])

This was not for lack of trying: Lord Anglesea sought to justify the privilege in *both* theories, arguing that "the privilege is not merely that of the attorney to maintain his honor by keeping a client's secrets, but is a privilege of the client against disclosure of those secrets."[123] But the result was not so unpredictable, for Wigmore explains that "by reason of the inconsistency of the two theories, in some of their practical applications, the older notion, so far as represented in precedents, struggled along for some time by the side of the newer one, like two powerful streams debouching into the same channel," and as a result, "a turbid and confused volume of rulings abounded" until well into the 1800s.[124] Likewise, Drysdale writes that "[i]t took some time before the privilege was fully viewed as the client's and not (at least not solely) the legal advisor's."[125] And Hazard charts roughly the same rough course via a litany of varying results through 1830 that are decidedly niggardly with privilege by modern standards.[126] To these voices may be added Weeks[127] and some hitherto unmentioned authorities to be encountered in good time,[128] who agree there was much turbidity in the waters for a time.[129]

The doctrinal turbidity eventually abated: Weeks, Wigmore, Hazard, and Drysdale all alight upon a singular case of 1833 as enunciating the

120. *Id.* at 1237 (quoted and discussed in Hazard, *supra* note 23, at 1073-80).

121. *See Drysdale's History*, *supra* note 27, § 1:9 & n.10; Hazard, *supra* note 23, at 1078-79 & n.71.

122. *Annesley*, 17 How St. Trials at 1224-28 (discussed at Hazard, *supra* note 23, at 1074 and TAYLOR 2D, *supra* note 79, § 857, at 753).

123. Hazard, *supra* note 23, at 1077; *see also Drysdale's History*, *supra* note 27, § 1:9 & nn.8-9.

124. WIGMORE, *supra* note 12, § 2290, at 3195; *see also* Pye, *supra* note 65, at 16.

125. *Drysdale's History*, *supra* note 27, § 1:3 & n.6.

126. *See* Hazard, *supra* note 23, at 1080-83 ("As of 1830, the attorney-client privilege in England stood in this relatively definite but very limited state.").

127. *See* WEEKS, *supra* note 22, §§ 142-143, at 295-298.

128. *See infra* Section II-B.

129. *See, e.g.*, GREENLEAF 12TH, *supra* note 52, § 240 at 271 & nn.4-7.

modern conception of the privilege.[130] In *Greenough v. Gaskell*,[131] the Lord Chancellor Henry Brougham, lately ennobled as Baron Brougham and Vaux, offered a throaty endorsement of a robust privilege rooted in the client's rather than attorney's prerogative and indeed, the good functioning of the entire system of public justice:[132]

> The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection . . . . But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skillful person, or would only dare to tell his counsellor half his case.[133]

Lord Brougham was prolific, embodying the entire equitable power of Britain in one person.[134] He had decided another heralded case espousing a broad privilege in the very same year, *Bolton v. Liverpool*,[135] which went so far as to quote the law of Rome as evidencing a broad and thorough protection.[136] Drysdale accords Bolton the honor of properly interring the Radcliffe rule, albeit not without some conflicts.[137] Following Greenough and Bolton, the justification of attorney-client privilege thus settled into more or less its final form prior to Wigmore.[138]

With this sea change in the philosophical underpinnings of the privilege, dispute as to the scope of the attorney's privilege from

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130. *See Drysdale's History*, *supra* note 27, § 1:11 & nn.2-14; Hazard, *supra* note 23, at 1083-85; WIGMORE, *supra* note 12, § 2291, at 3197; WEEKS, *supra* note 22, § 193, at 296-97.

131. Greenough v. Gaskell, (1833) 1 Myl. & K. 98, 39 Eng. Rep. 618 (Ch.).

132. *Id.*

133. *Id.* at 103, 621 (quoted in WIGMORE, *supra* note 12, § 2291, at 3197 and *Drysdale's History*, *supra* note 27, § 1:11 & n.13). Weeks quotes a different section of the opinion: "If, touching matters that come within the ordinary scope of professional employment, a solicitor receives a communication in his professional capacity, either from a client or on his account, and for his benefit, in the transaction of his business, or which amounts to the same thing, if he commits to paper in the course of his employment on his behalf, matters which he knows only through his professional relation to his client, he is not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as a party or witness." *Id.* (quoted in WEEKS, *supra* note 22, § 193 at 297).

134. *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 420 (2017) (discussing "a structural feature of English equity: there was one Chancellor").

135. Bolton v. Corp. of Liverpool, (1833) 1 Myl. & K. 88, 39 Eng. Rep. 614 (Ch.).

136. *Id.* (quoted *supra* note 52).

137. *See Drysdale's History*, *supra* note 27, § 1:8 & nn.4-6.

138. *See, e.g.*, Hazard, *supra* note 23, at 1084-87; TAYLOR 2D, *supra* note 79, §§ 834-35, at 732-34 (discussing *Greenough* and *Bolton*).

compulsory testimony about his client grew vexing.[139] Greenough declared that "[i]f the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous."[140] But in its beginnings, the notion of privilege had been straightforwardly and narrowly limited to testimony anent a pending or at least imminent lawsuit.[141] Indeed, even in the early 1800s, there had been a strident resurgence of this less protective view under the superintendence of the Lord Chief Justice of the King's Bench Charles Abbott, later Baron Tenterden, creating tension between the British courts of law (i.e. the King's Bench) and those of chancery (the latter, being under the ultimate superintendence of the Lord Chancellor at the time, equating roughly to modern common law courts of equity, such as still exist in the United States of America in Delaware).[142] This strict linkage, however, had been at least partly based in the now-outmoded view of the barrister's privilege, and so the question simmered as to whether it had obsolesced along with the pundonor, and privilege might now extend to all professional exchanges with counsel.[143]

Wigmore is quite certain that it did,[144] and supplies a lengthy list of authorities saying so, not least of which is Lord Brougham.[145] Weeks acknowledges the contrary eminences supporting the original, strict rule,[146] but after a dutiful measure of hand-wringing, accepts the older authorities to be outdated and the broader rule to be correct.[147] Drysdale, with customary punctiliousness, detects some final settling throughout the 1800s before atavisms were fully assimilated, with Lord Chancellor Roundell Palmer, later created Earl Selborne, announcing at last in 1873

139. *See* WIGMORE, *supra* note 12, § 2290, at 3194-96; WEEKS, *supra* note 22, §§ 142-143, at 295-304.

140. *Greenough*, 1 Myl. & K. at 103, 39 Eng. Rep. at 621 (quoted in WEEKS, *supra* note 22, § 143 at 299).

141. WEEKS, *supra* note 22, § 143, at 295-96 ("[I]n the earlier cases, when the origin of the rule would be most likely to be kept in view, this doctrine would seem to have been most strictly applied, and the witness excused from testifying, on the ground that he was attorney in the cause."); *see* WIGMORE, *supra* note 12, § 2290, at 3196.

142. *See Drysdale's History*, *supra* note 27, § 1:10.

143. *See* WIGMORE, *supra* note 12, § 2290, at 3196 (""[T]he attorney's exemption was by the original theory limited to communications received since the beginning of the litigation at bar and for its purposes only."); WEEKS, *supra* note 22, § 143, at 300-02.

144. WIGMORE, *supra* note 12, § 2290, at 3196 ("Under the influence of the newer theory, an extension of the attorney's exemption of course took place, to include communications made, first, during any other litigation, next, in contemplation of litigation, next, during a controversy but not yet looking to litigation, and, lastly, in any consultation for legal advice, wholly irrespective of litigation or even of controversy.").

145. *Id.* § 2291, at 3197-99. It must be observed that Wigmore also quotes for two entire pages the discourse of Jeremy Bentham arguing against such an attorney-client privilege, but he then proceeds to address and rebut the arguments in serial fashion. *Id.* § 2291, at 3199-3204.

146. WEEKS, *supra* note 22, §§ 142-143, at 295-296.

147. *Id.* at 299-305.

that "any such limitation was really ill-founded" and had long before been overruled in effect.[148] Hazard, ever the jurisprudential gadfly, concludes from his historical review that "'tradition,' both British and American, thus clearly sustained a privilege confined to those communications that are related directly to pending or anticipated litigation."[149] Perhaps that is so, but the tradition of an earlier era had evolved well beyond so narrowly delimited a protection by the time of Wigmore.[150]

B. Privilege in the Nineteenth Century Treatises

This discussion has thus far been much acquainted with Wigmore, Drysdale, Hazard, and Weeks (pace others) by dint of their historical research, but there await a greater library of treatises that state the law of privilege prevailing in the nineteenth century, when Wigmore was born. Likely the work of Samuel March Phillipps is the foremost, with editions published in both America and Britain.[151] In 1817, Phillipps elaborates that "[c]onfidential communications between attorney and client are not to be revealed at any period of time — not in an action between third persons — nor after the proceeding, to which they referred, is at an end — nor after the dismissal of the attorney."[152] True, "this privilege of the client is confined to such communications as are made with reference to professional business during the relation of attorney and client," but his is the broad view that Lord Brougham would proclaim sixteen years later.[153] Forty years later yet, Phillipps's rhetoric controlled still, and his essential textbook remained the American tractate on the law of privilege, perhaps having proven prescient.[154] As both the British and American editions agree as to counsel, "the mouth of such a person is shut forever."[155] Yet evidencing the early state of affairs, the American edition of Phillipps reminisces fondly in 1843 of the perhaps more proper days during which a gentleman's honor prevented his being turned against a confidante, even whilst ruing it is no longer so.[156]

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148. *See Drysdale's History*, *supra* note 27, § 1:8 & nn.8-15 (quoting Minet v. Morgan, (1873) L.R. 8 Ch. App. 361 (Ch.)).

149. Hazard, *supra* note 23, at 1091.

150. WIGMORE, *supra* note 12, § 2290, at 3196 ("But this gradual extension occupied (in England, at least) nearly a hundred years of judicial annals; and the shackles of the earlier precedents were not finally thrown off until the decade of 1870.").

151. *See* PHILLIPPS AM. 2D, *supra* note 33; SAMUEL MARCH PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE (London, A. Strahan 3d British ed. 1817) (1814) [hereinafter PHILLIPPS BR. 3D]; *see also* RUSSELL 6TH, *supra* note 98, at 581 & n.*(a)* (describing Phillipps as "a very eminent writer on the Law of Evidence").

152. PHILLIPPS BR. 3D, *supra* note 151, at 108.

153. *Id.*

154. *See* PHILLIPPS AM. 2D, *supra* note 33.

155. PHILLIPPS AM. 2D, *supra* note 33, at 142; PHILLIPPS BR. 3D, *supra* note 151, at 108.

156. *See* PHILLIPPS AM. 2D, *supra* note 33, at 144-45 ("And if the privilege, now claimed, extended to all cases and persons, Lord W. Russel died by the hands of an assassin, and not by the hands of the law; for his friend Lord Howard was permitted to

Three further treatises of the middle decades of the century provide confirmation that the privilege was well accepted and inured to the client's protection rather than the attorney's honor.[157] John Pitt Taylor's second edition of 1855 declares that "the rule is now well settled, that, where a barrister, solicitor, or attorney, is professionally employed by a client, all communications which pass between them in the course and for the purpose of that employment, are so far privileged."[158] And Taylor's privilege is firmly rooted in the client-oriented rationale of Lord Brougham, whose cases of two decades earlier are cited already as celebrated truisms.[159] Edmund Powell's third edition of 1869 introduces his section on privilege with the heading that "[c]ounsel, solicitors, and attorneys cannot be compelled to disclose communications which have been made to them in professional confidence by their clients,"[160] and in short order cites Lord Brougham as to the reason why.[161] Powell neatly distinguishes away the then-recent contrary cases under the King's Bench of Lord Tenterdon ostensibly limiting privilege to litigation by accepting the view that privilege begins when counsel is retained and ends when he is dismissed (though his lips remain sealed thereafter), and so if that retention extends before or beyond a case at bar so too does the privilege.[162]

A particular introduction is due the third mentioned, by Simon Greenleaf, whose exposition of evidence in 1842 had proven so popular that it had reached its twelfth edition by 1866, not long after its original author's demise.[163] Drysdale, indeed, places him above Phillipps in eminence.[164] Evincing the degree to which American law remained based in the Anglo-American common tradition, Greenleaf attends to Lord

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give evidence of confidential conversations between them. All good men, indeed, thought that he should have gone almost all lengths rather than have betrayed that confidence; but still, if the privilege had extended to such a case, it was the business of the court to interfere, and prevent the evidence being given." (citations omitted)); *see also* WIGMORE, *supra* note 12, § 2287, at 3189 (noting that the *pundonor*'s "expiry was undoubtedly viewed with reluctance by many, and traces of its later survival across the water were to be noticed for some time thereafter" (citations omitted)).

157. EDMUND POWELL, JOHN CUTLER & EDMUND FULLER GRIFFIN, THE PRINCIPLES AND PRACTICE OF THE LAW OF EVIDENCE (London, Butterworths 3d ed. 1869) [hereinafter POWELL 3D]; GREENLEAF 12TH, *supra note* 52; TAYLOR 2D, *supra* note 79.

158. TAYLOR 2D, *supra* note 79, § 832, at 730-31.

159. *Id.* §§ 834-35 at 732-34.

160. POWELL 3D, *supra* note 157, at 96.

161. *Id.* at 97 n.*(e)* and accompanying text ("But for the existence of the rule, 'no man would dare to consult a professional adviser with a view to his defence, or the enforcement of his rights.'") (quoting Bolton v. Corp. of Liverpool, (1833) 1 Myl. & K. 88, 39 Eng. Rep. 614 (Ch.)).

162. *Id.* at 100-01.

163. GREENLEAF 12TH, *supra* note 52.

164. *Drysdale on Confidentiality, supra* note 27, at n.13. Drysdale, however, writes without any asserted basis and a century after the fact, and so contemporary encomia may be more illuminating. *E.g.*, RUSSELL 6TH, *supra* note 98, at 581 & n.*(a)*; 2 WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS 611 & n.*(n)* (London, Jos. Butterworth & Son 2d ed. 1828) (1819) [hereinafter RUSSELL 2D]. All the same, Greenleaf was assuredly taken as a magister of the practice.

Brougham's *Greenough* for the rationale of the privilege as his first order of business.[165] Greenleaf likewise inters the contrary decision of *Radcliffe*,[166] which he declares "was not satisfactory; and though it was silently followed in one case, and reluctantly submitted to in another, yet its principle has since been ably controverted and refuted," citing Lord Brougham in *Bolton* this time.[167] So too Greenleaf diligently recites the ancient series of attempts to limit privileged exchanges to litigation before concluding succinctly that "all these distinctions have been overruled, and the communications held to be within the privilege."[168] Indeed, Greenleaf provides thoughtful evidence from *Bolton* and beyond that the American, British, and English rules of privilege all ultimately look back to Roman law.[169] To adopt his sage summary, "[t]he great object of the rule seems plainly to require that the entire professional intercourse between client and attorney, whatever it may have consisted in, should be protected by profound secrecy."[170]

The final decade of the nineteenth century brought Weeks's second edition of 1892, of which much has been said already.[171] Of novel interest, however, is the sixth edition of William Oldnall Russell's work in 1896, which may usefully be contrasted with the second in 1828.[172] In the earlier version, Russell cites Phillipps's "eminent" view of privilege as extending to all professional legal work, but remains obligated to cite the contrary authorities without fully endorsing either the broader or stricter view.[173] In 1828, of course, Lord Brougham had not yet opined, nor was he yet even chancellor.[174] By contrast, Russell's sixth edition notes that "it is now clearly settled that the privilege of professional confidence is not limited to cases in which a suit is in contemplation, but that the client's privilege extends much beyond communications in respect of a suit."[175] Russell, indeed, much mirrors his contemporary Weeks on the matter.[176] The dramatic increase of detail from 1828 to 1896 is likewise instructive, as Russell's treatment more than doubles from barely six pages to fourteen.[177] Both editions nonetheless agree that "[t]he privilege of not

165. GREENLEAF 12TH, *supra* note 52, §§ 237-38, at 267-68 & nn.2-3.

166. Radcliffe v. Fursman, (1730) 2 Bro. P.C. 514, 1 Eng. Rep. 1101 (HL) (discussed *supra* notes 111-113).

167. GREENLEAF 12TH, *supra* note 52, § 240, at 271 & nn.4-7.

168. *Id.* § 240a, at 274.

169. *Id.* § 238 at 268 n.2; *id.* § 240, at 271-72 n.7 (quoting Bolton v. Corp. of Liverpool, (1833) 1 Myl. & K. 88, 39 Eng. Rep. 614 (Ch.)); *see supra* notes 52-53.

170. *Id.* at 271-72. Wigmore would have something to do with Greenleaf's great work, as shall be detailed later. *See infra* text accompanying notes 239-241.

171. WEEKS, *supra* note 22, §§ 141-182, at 293-379.

172. *Compare* RUSSELL 6TH, *supra* note 98, *with* RUSSELL 2D, *supra* note 164.

173. RUSSELL 2D, *supra* note 164, at 611-12.

174. Greenough v. Gaskell, (1833) 1 Myl. & K. 98, 39 Eng. Rep. 618 (Ch.); Bolton v. Corp. of Liverpool, (1833) 1 Myl. & K. 88, 39 Eng. Rep. 614 (Ch.).

175. RUSSELL 6TH, *supra* note 98, at 582 & n.*(g)* (citing *Greenough*).

176. *See supra* notes 146-146.

177. *Compare* RUSSELL 2D, *supra* note 164, at 609-615, *with* RUSSELL 6TH, *supra* note 98, at 578-592. Citations to Russell's Sixth in Section II-C *infra* accordingly predominate.

being examined on such subjects is the privilege of the client, and not of the attorney or counsel; and it never ceases,"[178] corroborating at least that even before Lord Brougham the demise of the *pundonor* and attorney's privilege was well understood. Also edifying by way of contemporaneity is the work of Elliott & Elliott in 1904, the same year Wigmore's treatise appeared.[179] Though brief, the Elliotts' treatment confirms further the prevailing rationale for and breadth of the rule.[180]

So speak the treatises,[181] limning the destination at which attorney-client privilege had arrived by the close of the nineteenth century. Hazard, it must be noted, finds the courts of early America at least as resistant to a broad privilege as those of England.[182] But the great weight of contemporary writings is to the contrary, as has been seen,[183] and at least some measure of Hazard's supposed authority apparently reflects conflation of the *pundonor* with the modern rationale.[184]

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178. RUSSELL 2D, *supra* note 164, at 610; *accord* RUSSELL 6TH, *supra* note 98, at 578 (substituting "solicitor" for "attorney").

179. 1 BYRON K. ELLIOTT & WILLIAM F. ELLIOTT, A TREATISE ON THE LAW OF EVIDENCE (Bobbs-Merrill Co. 1904).

180. *Id.* § 624 at 735 (rationale); *id.* § 625, at 736 & n.14 (lack of connection to litigation).

181. Besides those ineluctably omitted because of space or authorial oversight, one notable authority has yet to appear: James Bradley Thayer, who, as shall be elaborated in due course, was Wigmore's mentor and an authority on evidence in his own right. *See infra* notes 287-297 and accompanying text. There is also Jeremy Bentham's whose strident broadside critique of privilege as a whole will be further elaborated below, as it ill fits the more nuanced discussions of those presuming the validity of privilege in the first place. *See* 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE SPECIFICALLY APPLIED TO ENGLISH PRACTICE 302-25 (London, Hunt & Clarke 1827) (discussed *infra* notes 307-320).

182. *See* Hazard, *supra* note 23, at 1087-91. Hazard's discussion is much complicated because the cases he surveys are predominantly concerned with attorneys who arguably abetted their clients' frauds, and thus privilege might rise or fall based on the applicability of the well-accepted crime-fraud exception to privilege.

183. *See supra* Section II-B. Even one of Hazard's courts surveying the attorney's tawdry behavior concluded that "if the question had arisen for the first time in this case[,] I should have no hesitation in deciding that the communications . . . were not privileged. . . . The practice, however, appears to have been otherwise for more than a century and a half, and I do not now feel authorized to adopt a new rule on the subject." Bank of Utica v. Mersereau, 3 Barb. Ch. 528, 598 (N.Y. Ch. 1848) (Walworth, Ch.) (quoted in Hazard, *supra* note 23, at 1090). Such language speaks to a well-recognized privilege rather than one only fitfully credited. *See* GREENLEAF 12TH, *supra* note 52, § 239a, at 270 ("The decisions upon this point are very numerous in the American States.").

184. *See, e.g.*, Potter v. Inhabitants of Ware, 55 Mass. 519 (1848). There, counsel had raised an objection to admission of the attorney's evidence on appeal, pointing to the principle that "the practice of allowing the counsel in a cause to give evidence therein, as a witness for his client, is dangerous, indecent and reprehensible. When counsel are put upon the stand as witnesses, their conduct becomes liable to animadversion, and the profession may thus be brought into contempt," but conspicuously omitting Lord Brougham's reasoning in favor of a pair of bail court cases. *Id.* at 520-22. The court was not impressed with the bail court cases, whose authority was found lacking, and as for the attorney's "animadversion," concluded: "In most cases, counsel cannot testify for their clients without subjecting themselves to just reprehension. But there may be cases in which they can do it, not only without

C. "Confidentiality" and Attorney-Client Relations Before Wigmore

Giving these precedents effect, an 1856 opinion of the Alabama Supreme Court is representative in declaring the framework for privilege, citing *Greenough* and quoting Lord Brougham at length:

> There is, perhaps, no principle of law which rests on a sounder basis, or which is supported by a more uniform chain of adjudication, than that which holds all information acquired by an attorney from his client, touching matters that come within the ordinary scope of professional employment, as privileged communications.[185]

The lack of any caveat anent confidentiality to "all information" is telling. In the treatises before Wigmore, both British and American, it is roundly presumed that *all* exchanges with retained counsel for legal purposes are by nature confidential and to be kept so.[186] Or as Drysdale puts it, it is the relationship that must be confidential, not any particularized communication.[187] This duty of the lawyer — to keep the client's secrets, upon his honor — dates back to the earliest days of the

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dishonor, but in which it is their duty to do it. Such cases, however, are rare; and whenever they occur, they necessarily cause great pain to counsel of the right spirit." *Id.* at 523-24.

185. Parish v. Gates, 29 Ala. 254, 259-60 (1856) (citing Greenough v. Gaskell, (1833) 1 Myl. & K. 98, 39 Eng. Rep. 618 (Ch.)).

186. *E.g.*, WEEKS, *supra* note 22, § 143, at 299 ("And in fact, the English rule, as sustained by the weight of authority, is now, that *prima facie* all communications passing between an attorney or solicitor and his client, with relation to business to be transacted by the former for the latter, are to be deemed privileged."); *see, e.g.*, ELLIOTT & ELLIOTT, *supra* note 179, § 623, at 734 ("Communications between attorney and client, as to legal matters, are privileged, if made for the purpose of professional advice or aid."); RUSSELL 6TH, *supra* note 98, at 579 ("The privilege is strictly confined to communications made to counsel, solicitors, and attorneys. No others, however confidential, or whatever be the relation or employment of the party entrusted, are privileged."); POWELL 3D, *supra* note 157, at 96 ("Neither the attorney nor counsel can be compelled nor permitted, without the consent of the client, to make any disclosure or admission which may be fairly presumed to have been communicated by the client, with reference to the matter in issue, under an implied promise of secrecy."); GREENLEAF 12TH, *supra* note 52, § 240, at 271-72 (quoted *supra* note 170); TAYLOR 2D, *supra* note 79, § 832, at 730-31 (quoted *supra* note 158); PHILLIPPS AM. 2D, *supra* note 33, at 140 ("This is founded on the professional confidence, which a client reposes in his counsel, attorney, or solicitor, and which courts of justice ever hold to be inviolable."); PHILLIPPS BR. 3D, *supra* note 151, at 108 (same); *cf. Drysdale's History*, *supra* note 27, § 1:5 ("It was the confidential nature of the relationship between a legal advisor and client that gave rise to an implied pledge of secrecy—a promise that the legal advisor would not disclose the contents of communications with his client to third parties."). *But see also, e.g.*, RUSSELL 6TH, *supra* note 98, at 583 ("A communication made to a solicitor, *if confidential*, is privileged in whatever form made; if it would be privileged when communicated in words spoken or written, it will be privileged equally when conveyed by means of sight instead of words." (emphasis added)).

187. *See Drysdaleon Confidentiality*, *supra* note 27, § 6:3 & n.5 ("When the word 'confidential' was used, courts were referring to the professional relationship between attorney and client, *not* the client's *communication*."); *Drysdale's History*, *supra* note 27, § 1:5.

privilege.[188] And if honor does not suffice, courts will exclude the testimony, for the privilege is now of the client, not counsel.[189] It is thus held unnecessary that a client instruct counsel on what is self-evident and presupposed: that their exchanges are to be secret.[190] Only when it is manifest that a conversation involving counsel is *not* meant to be held secret[191] — as when it is held amongst all the parties in common — do the treatises hold that no privilege attaches, for the obvious reason that there would be no expectation of it.[192] Where intercourse is had with adversaries, no litigant would suppose it would not by them be adduced if advantageous.[193]

By this logic, the adversaries might subpoena a third party rather than testify themselves makes privilege no more applicable.[194] Where an unaffiliated third party is allowed to be present, therefore, no privilege as to the third party could be intended, and there is no expectation to protect — though even here, Phillipps advises that the *attorney* still may not testify.[195] So also Powell notes that *counsel's* written correspondence with a third party in a suit is immune to discovery.[196] What matters, under the prevailing rationale, is that the client reasonably expects the matters he

188. *See supra* notes 78-79 and accompanying text.

189. *See* RUSSELL 6TH, *supra* note 98, at 578-79 n.*(d)*; *infra* notes 217-224 and accompanying text.

190. ELLIOTT & ELLIOTT, *supra* note 179, § 625, at 737 ("It is not necessary that the client should in effect enjoin secrecy."); *see* POWELL 3D, *supra* note 157, at 96 (quoted *supra* note 186 as to the "implied promise of the secrecy").

191. *See* GREENLEAF 12TH, *supra* note 52, § 244, at 277 (noting no privilege would apply "where the matter communicated was not in its nature private, and could in no sense be termed the subject of a confidential disclosure").

192. *See* WEEKS, *supra* note 22, § 143, at 305 ("But where the communications are made in the presence of all the parties to the controversy, they are not privileged, and the evidence is competent between such parties"); *id.* § 159 at 338; RUSSELL 6TH, *supra* note 98, at 580-81.

193. *See, e.g.*, WEEKS, *supra* note 22, § 151a, at 331 ("A communication made to an attorney by one party, with the intent of having it made known to the adverse party, is not privileged."); RUSSELL 6TH, *supra* note 98, at 580 & n.*(m)* (noting propriety of admitting the written work of counsel provided to opposing party).

194. *See* ELLIOTT & ELLIOTT, *supra* note 179, § 625, at 737 ("When third persons are present and hear the communications such persons may testify as to them."); RUSSELL 6TH, *supra* note 98, at 580 & n.*(u)* (noting propriety of subpoenaing the clerk in a conversation between plaintiff and defendant); PHILLIPPS AM. 2D, *supra* note 33, at 145 ("Propositions, which the attorney of one party has been professionally employed to make to the adverse party, and which he made in the presence of a third person, though they are not to be disclosed by the attorney himself, may yet be proved by the person, who heard him deliver them."); RUSSELL 2D, *supra* note 164, at 611 (similar).

There is the matter of Drysdale, who thinks even a third party's known presence makes no difference to the privilege, which targets only the attorney and has no concern for others' presence. *See Drysdale on Confidentiality*, *supra* note 27, § 6:3 & nn.6-7. But he writes many decades after the fact, and even he accepts that by the late 1800s, the intended presence of a third party resulted in no protection for any communications, though this is presented as an innovation, as well it may have been, but one prior to Wigmore. *See id.* at nn.8-16 (discussing Greenleaf's views).

195. PHILLIPPS AM. 2D, *supra* note 33, at 145.

196. POWELL 3D, *supra* note 157, at 101 ("[I]t has been held, that when a solicitor writes letters to a third party for the purposes of a suit the answers are privileged.").

has divulged to his counsel be kept secret.[197] This is again illustrated by the fact that an attorney's interpreters, agents, and clerks do not count as third parties and cannot be subpoenaed, for as obvious amanuenses of counsel they render secrecy no less presumptive.[198] Taylor and Greenleaf, indeed, comment that clerks were initially viewed with skepticism, but their integrality to counsel's work quickly confirmed them within the expected bounds of privilege.[199] In sum, the confidentiality (construed as secrecy) of communications at the dawn of the twentieth century was not an elemental prerequisite of privilege but a presupposition of attorney-client relations.[200] The rationale of Lord Brougham cannot be vindicated otherwise,[201] as so many of the treatises emphasize in quoting the Baron at length.[202]

A few clarifications are in order.[203] It need hardly be reiterated that counsel, no longer protected by the *pundonor*, may not refuse to testify to what he knows from sources independent of the professional relationship

197. *See* ELLIOTT & ELLIOTT, *supra* note 179, § 625, at 735-36 ("For the communications to come within the rule it is essential that the relation of attorney and client should exist, or there must at least be a belief that it does exist."); sources cited *supra* note 186. So too the contrary. *E.g.*, WEEKS, *supra* note 22, § 151a, at 332 ("So, generally, a communication made by a client to his attorney for the purpose of being made public . . . is not privileged."); GREENLEAF 12TH, *supra* note 52, § 244, at 277 (quoted *supra* note 191).

198. *See* ELLIOTT & ELLIOTT, *supra* note 179, § 625, at 737 ("But the rule of secrecy extends to an interpreter, an agent, or clerk of an attorney."); WEEKS, *supra* note 22, § 161, at 341-42 (clerks and interpreters); POWELL 3D, *supra* note 157, at 101; GREENLEAF 12TH, *supra* note 52, § 239, at 269 & nn.2-3; TAYLOR, *supra* note 79, § 841, at 739; PHILLIPPS AM. 2D, *supra* note 33, at 144 ("A person who acts as interpreter, or agent, between an attorney and his client, stands precisely in the same situation as the attorney himself; he is considered as the organ of the attorney, and is under the same conditions of secrecy."); RUSSELL 2D, *supra* note 164, at 611 & nn.*(f)-(h)*.

199. GREENLEAF 12TH, *supra* note 52, § 239, at 269 & n.5; TAYLOR, *supra* note 79, § 841, at 739.

200. *See, e.g.*, WEEKS, *supra* note 22, § 143, at 300-01 ("'A lawyer, no matter in what capacity he may be employed,' says Wharton, 'is not, by Anglo-American law, permitted to disclose communications made to him by his client in the course of their professional relations. Oral communications are thus protected, and *a fortiori* does the privilege extend to cases stated for the opinion of counsel, and to written instruments held by counsel or attorneys on behalf of clients.'"); *see* sources cited *supra* notes 186, 197.

201. Greenough v. Gaskell, (1833) 1 Myl. & K. 98, 39 Eng. Rep. 618 (Ch.); Bolton v. Corp. of Liverpool, (1833) 1 Myl. & K. 88, 39 Eng. Rep. 614 (Ch.); *see also* WEEKS, *supra* note 22, § 143, at 303-04 ("The rule requires that the entire professional intercourse between client and attorney, whatever it may have consisted in, should be protected by profound secrecy. The exemption is not confined to advice given or opinions stated. It extends to facts communicated by the client—all that passes between client and attorney in the course and for the purpose of the business.").

202. *See supra* Section II-B.

203. *See Drysdale's History*, *supra* note 27, § 1:5 & nn.1-3; *see also id.* § 1:9 & nn.6-10.

with the client.[204] True, this "exception," as in *Annesley*,[205] is distended occasionally where a client's comment to counsel is clearly gratuitous to their professional relationship, as was *post facto* braggadocio "in exultation to his attorney for having before deceived him as well as his adversary, and for having obtained [won] his suit."[206] But as Lord Bowes thought, this is when a "wicked" declaration exceeds any sense of professional status.[207] So too follows the well-heeled "crime-fraud exception" to the privilege, which rightly denies the protection where the nominal attorney is not acting in a professional capacity but as an accomplice or conspirator in the commission of a crime.[208] In the end, this pair of exemptions are not really exceptions at all, but rather recapitulate the definition of the privilege, as reflected by their conflation in *Annesley* itself:[209] that the communication to be protected must be one between attorney and client in service of a legitimate professional relationship.[210]

A rill of a countercurrent in the nineteenth century might be conjured from a few scattered notes involving decidedly outré circumstances: Elliott & Elliott, for example, offer the peculiarity that the presence of an academic law student — as opposed to an employed clerk — in a lawyer's office dispels the presupposition of privilege.[211] There is

204. *See* RUSSELL 6TH, *supra* note 98, at 589; WEEKS, *supra* note 22, § 143, at 300; POWELL 3D, *supra* note 157, at 100; TAYLOR 2D, *supra* note 79, § 852, at 747-49; PHILLIPPS AM. 2D, *supra* note 33, at 145-47; *see also* W.C. Rodgers, *Privileged Communications Between Attorney and Client*, 64 CENT. L.J. 66, 70-71 (1907) ("While an attorney cannot be required to divulge any confidential communication from his client, yet this does not preclude him from testifying for his client in proper cases as to any facts he may know which have not been communicated to him in confidence."); *cf. Drysdale's History*, *supra* note 27, § 1:5 & n.4.

205. *See supra* notes 119-122.

206. RUSSELL 6TH, *supra* note 98, at 590 & n.*(x)*.

207. *See* Hazard, *supra* note 23, at 1079 n.71.

208. ELLIOTT & ELLIOTT, *supra* note 179, § 625, at 736 & n.18 ("But where the communications are for an illegal purpose, having for their object the commission of a crime, the privilege cannot be claimed."); WEEKS, *supra* note 22, § 167, at 359; *id.* § 170, at 363-64; RUSSELL 6TH, *supra* note 98, at 587 & n.(g) ("A very important question arises, where a solicitor has been employed for an illegal purpose, whether any communication in furtherance of such purpose can be considered as privileged; and the authorities appear to be very strong that no privilege exists in such cases."); GREENLEAF 12TH, *supra* note 52, § 239a, at 270 & n.13 (no privilege for a "fraudulent combination" entered into by attorney and client).

209. *See* RUSSELL 6TH, *supra* note 98, at 587 n.*(g)*.

210. *See* ELLIOTT & ELLIOTT, *supra* note 179, § 626, at 737; WEEKS, *supra* note 22, § 141, at 294; *see also Drysdale's History*, *supra* note 27, § 1:5 & nn.1-3 ("When the privilege first appeared in the sixteenth century, it protected a legal advisor from revealing the secrets communicated by his clients to him in his professional capacity. The privilege also was understood to protect a legal advisor's advice to his client. To qualify, the communication must have been for a lawful purpose, as communications for a criminal purpose did not fall within the privilege.").

211. ELLIOTT & ELLIOTT, *supra* note 179, § 625, at 737. Perhaps the analogy is to an attorney not actually employed in the matter at hand? *See* PHILLIPPS AM. 2D, *supra* note 33, at 145 ("A person, by profession an attorney, but not employed as attorney in the particular business, which is the subject of inquiry, is not within the rule, although he may have been consulted confidentially.").

also the repeated admonishment that secrets confessed to an arrant dissembler to the legal profession are not privileged.[212] Most troublesome (as shall be seen) is a comment on accidental or unknown eavesdroppers, whose tongues Greenleaf believes cannot be stayed.[213] Weeks too offers the exception of the law student, and adds that a client mistaking a law student for a licensed lawyer forgoes the privilege.[214] In all these cases the client may very reasonably intend and believe the conversation to be privileged, but some odd and unbeknownst quirk — be it the student, impostor, or eavesdropper — purportedly nullifies the expectation on which the rationale of the rule depends after Lord Brougham: that the client be free to confess his legal case to counsel in apparently secure environs.[215] Yet these oddities are only that: the minutest cavils to a doctrine that by the end of the nineteenth century thoroughly recognized and protected the client's security, irksome though such flaws may be to legal completism.[216]

Finally, what of the grave matter of treachery by the attorney? Taylor supposes that evidence voluntarily provided by a perfidious attorney would be admissible, and then adds insult to injury, declaring that "the mere fact that papers and other subjects of evidence have been illegally taken from the possession of the party against whom they are offered, or otherwise *unlawfully* obtained, constitutes no valid objection to their admissibility."[217] Taylor's endorsement of courts as majestically aloof from even taking notice of such lawlessness,[218] however, seems to have been rejected by the end of the eighteenth century, for Russell in 1896 reprehends earlier dicta suggesting a court might admit evidence in derogation of the privilege, finding more recent law has "set at rest" the idea that courts would allow counsel to illegally implicate a client.[219]

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212. *See* RUSSELL 6TH, *supra* note 98, at 580 & n.*(r)*; POWELL 3D, *supra* note 157, at 101; GREENLEAF 12TH, *supra* note 52, § 239a, at 270 & n.3; *id.* § 241, at 275 & n.6; RUSSELL 2D, *supra* note 164, at 611.

213. *See* GREENLEAF 12TH, *supra* note 52, § 239a, at 270 & nn.1-2 ("And then the privilege of secrecy only extends to the parties to the relation and their necessary agents and assistants. Hence the privilege does not attach, if one is accidentally present; or casually overhears the conversation." (citations omitted)).

214. *See* WEEKS, *supra* note 22, § 161 at 342.

215. *Cf.* ELLIOTT & ELLIOTT, *supra* note 179, § 625 at 735-36 (quoted *supra* note 197); GREENLEAF 12TH, *supra* note 52, § 244 at 277 (quoted *supra* note 191).

216. *See, e.g.*, sources cited *supra* note 186. *See generally* Section II-B.

217. TAYLOR 2D, *supra* note 79, § 843, at 740-41. There is something of this in Weeks as well, where he quotes an earlier tractate indicating that if privileged papers are passed on by or purloined from an attorney, the third party who thereby gains possession or knowledge of them may testify as to their contents, regardless of the illegality of either the attorney's perfidy or the third party's theft. *See* WEEKS, *supra* note 22, § 163, at 348. But for counsel to be allowed to accomplish via a third party what he could not himself — violate his client's trust — makes no sense at all under *Greenough*'s rule, as Weeks himself had earlier acknowledged obliquely. *See id.* § 143, at 305 (quoted *infra* text accompanying note 223).

218. TAYLOR 2D, *supra* note 79, § 843, at 740-41 ("For the Court will not notice whether they were obtained lawfully or unlawfully, nor will it raise an issue to determine that question.").

219. RUSSELL 6TH, *supra* note 98, at 578-79 n.*(d).*

Russell's 1828 edition already holds the law "will neither oblige nor suffer" an attorney's breach,[220] and Powell in 1869 that attorneys can be neither "compelled nor permitted" to do so.[221] Greenleaf writes in 1866 that such counsel "are not only justified in withholding such matters, but bound to withhold them,"[222] and Weeks likewise writes in 1892 that "[a]s the rule is one chiefly for the protection of the client, the willingness of the attorney to divulge the privileged communications is not enough to warrant receiving them."[223] Even aside such consensus, it would be quite contrary to the rationale of Lord Brougham that Taylor embraces so heartily were courts to countenance evidence when the client's privilege is proposed to be violated by his own counsel.[224]

III. THE AMERICAN ARCHITECT OF PRIVILEGE LAW: JOHN HENRY WIGMORE

Sir William Holdsworth, so greatly esteemed by Drysdale,[225] writes of Wigmore in 1934:

> [T]he later years of the nineteenth and the first years of the present century may be regarded as the heroic age of the study in America of Anglo-American legal history. If England, in the first half of the seventeenth century, can boast such names as Selden, Spelman, Lambard, Bacon, Coke and Prynne, America in the later years of the nineteenth and the first years of the twentieth century can boast such names as Holmes, Langdell, Bigelow, Ames, Thayer,[226] Gray, and Wigmore. Of the contributions to legal history of these great men Dean Wigmore's contribution ranks very high both in quantity, and, what is far more important, in quality. Moreover, his work has a characteristic, which is not found to anything like the same extent in the writings of the other great American lawyers who have done so much to elucidate the problems of Anglo-American legal history. This characteristic is the large knowledge which he possesses of foreign systems of law, and the skilful use which he makes of this knowledge to elucidate the history of Anglo-American law.[227]

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220. RUSSELL 2D, *supra* note 164, at 610.

221. POWELL 3D, *supra* note 157, at 96 (quoted *supra* note 186).

222. GREENLEAF 12TH, *supra* note 52, § 237, at 267.

223. WEEKS, *supra* note 22, § 143, at 305.

224. *Compare* TAYLOR, *supra* note 79, § 843, at 740-41, *with id.* §§ 834-35, at 732-34. Perhaps, given Taylor's relatively early posture in 1855, there remained then some confusion between the modern privilege's full contours and the *pundonor* under which the privilege and its waiver rested with the attorney. *See* WIGMORE, *supra* note 12, § 2290, at 3195-96 (quoted *supra* note 150); *supra* notes 124-126; *e.g.*, *supra* note 184; *see also* Pye, *supra* note 65, at 16 ("Originally, the privilege seemed to be based upon the honor of the attorney and belonged to the attorney, who could waive it. During the 18th century, the courts found a new rationale in protecting the client from apprehension that his confidences might be betrayed. By the middle of the 19th century it was recognized that the privilege belonged to the client.").

225. *See supra* note 67.

226. Of whom see more below, *infra* notes 288-296 and accompanying text.

227. Sir William S. Holdsworth, *Wigmore as a Legal Historian*, 29 ILL. L. REV. 448, 448 (1935).

Before turning to the matter of Wigmore's magnum opus of 1904-1905 and its novel treatment of confidentiality, it is profitable to indulge a modest divagation to examine the man who penned it. If such a legal revolution is to spring from a single mind, one might think the cultivation and application of that mind matter. So they do, and the life of Wigmore is one well worth perusing even from afar.[228]

A. Wigmore: A Précis of a Precise Life's Work[229]

Wigmore was born in San Francisco on March 4, 1863.[230] Eschewing more local options, he matriculated at Harvard for both his undergraduate and legal education, graduating from the latter in 1887.[231] Whilst there, he fell under the tutelage of Professor James Bradley Thayer, a widely regarded eminence in the law of evidence.[232] He also demonstrated his penchant for written scholarship by his role in founding the *Harvard Law Review*,[233] based on a conviction that the professors and academics there "had a message for the professional world" and that

228. So worthwhile, indeed, that a nigh-countless number of legal authors have done so before. Perhaps most notable is William R. Roalfe, who was Wigmore's first biographer and also published an accessible twenty-five page sketch of his larger work. *See* William R. Roalfe, *John Henry Wigmore—Scholar and Reformer*, 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 277 (1962) [hereinafter Roalfe]. As Roalfe provides an accounting of the prior literature concerning Wigmore as of his 1962 writing, there is no call for duplication here. *Id.* at 277 n.*. There have, of course, been many works since, many published in the journal of the Northwestern University School of Law that Wigmore so long superintended. *See, e.g.*, ANDREW PORWANCHER, JOHN HENRY WIGMORE AND THE RULES OF EVIDENCE (U. Missouri 2016); Joel Fishman & Joshua Boston, *John Henry Wigmore: A Sesquicentennial Celebration*, *in* 6 UNBOUND: AN ANNUAL REVIEW OF LEGAL HISTORY AND RARE BOOKS 9-16 (2013); Richard D. Friedman, *John Henry Wigmore*, *in* YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 587-89 (R.K. Newman ed., Yale Univ. Press 2009); WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE (1985); David S. Ruder, *John Henry Wigmore: A Great Academic Leader*, 75 (suppl.) NW. U. L. REV. 1 (1981); James A. Rahl, *Wigmore as Professor and Dean*, 75 (suppl.) NW. U. L. REV. 4 (1981); Fred E. Inbau, *John Henry Wigmore and Scientific Evidence: A Personal Note*, 75 (suppl.) NW. U. L. REV. 8 (1981); Kenneth W. Abbott, *Wigmore: The Japanese Connection*, 75 (suppl.) NW. U. L. REV. 10 (1981); Kurt Schwerin, *Preface* and *Bibliography*, 75 (suppl.) NW. U. L. REV. 18 (1981); Felix Frankfurter, *John Henry Wigmore: A Centennial Tribute*, 58 NW. U. L. REV. 443 (1963); William R. Roalfe, *John Henry Wigmore: 1863-1943*, 58 NW. U. L. REV. 445; Arthur J. Goldberg, *Wigmore: Teacher and Humanitarian*, 58 NW. U. L. REV. 453 (1963); John M. Maguire, *Wigmore: Two Centuries*, 58 NW. U. L. REV. 456 (1963); Sarah B. Morgan, *Wigmore: The Man*, 58 NW. U. L. REV. 461 (1963); John Reid, *Brandy in His Water: Correspondence Between Doe, Holmes, and Wigmore*, 57 NW. U. L. REV. 522 (1962).

229. *See* Morgan, *supra* note 228, at 462 (relating, as Wigmore's secretary for twenty-four years, that "Mr. Wigmore was a meticulous worker").

230. PORWANCHER, *supra* note 228, at 7; Fishman & Boston, *supra* note 228, at 10; Roalfe, *supra* note 228, at 297.

231. PORWANCHER, *supra* note 228, at 8-9; Fishman & Boston, *supra* note 228, at 10; Roalfe, *supra* note 228, at 287.

232. *See* Jay Hook, *A Brief Life of James Bradley Thayer*, 88 NW. U. L. REV. 1, 5 (1993); Edmund M. Morgan & John MacArthur Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 909 (1937).

233. *See* Fishman & Boston, *supra* note 228, at 10.

"their pioneer work in legal education was not yet but ought to be well appreciated by the profession."[234] Following a brief stint in private practice after graduation, Wigmore was put forward by Harvard's president to be a visiting professor at Tokyo's Keio University, arriving to take up his position in 1889.[235] The timing was telling: Meiji Japan was rapidly westernizing its system of law and shedding its formal feudal forms, installing a new criminal code in 1881 and civil code in 1893, and reordering its judiciary in 1890.[236] Wigmore's advent thus placed him at the epicenter of the wholesale redrafting and systematization of a nation's legal system, providing perhaps some inspiration for his own future efforts.[237]

On his return to the United States in 1893, Wigmore accepted a professorial appointment at Northwestern University, where he was to spend the rest of his professional career.[238] He was soon thereafter selected to redact the sixteenth edition of Greenleaf's seminal work on evidence, which was released in 1899.[239] His biography in the Yale Encyclopedia relates that he "poured his massive energies into the project" despite the fact that its organization was "badly dated," inspiring Wigmore to contemplate a new treatment of the subject that could shed the trappings of the incoherent law of the past through a completely novel methodization.[240] Nonetheless, such was Wigmore's aptitude that the revised sixteenth edition, whatever the weaknesses of its aging foundations, won the first Ames Prize for legal scholarship awarded by Harvard University.[241] Perhaps not coincidentally, in 1901, he was appointed dean of the Northwestern University School of Law, a post he would occupy for several decades.[242] (As it will be developed in far greater detail later, Wigmore's preparation and release of his great treatise on evidence in 1904 and 1905 may be pretermitted for the present.[243])

Wigmore proved a frenetically active dean at Northwestern prior to the Great War.[244] From the start of his career at Northwestern, he was (despite his more academic predilections) a prolific fundraiser and proponent of the university that competed with its crosstown rival, the University of Chicago,[245] greatly expanding its physical plant and financial

234. PORWANCHER, *supra* note 228, at 9; *see* Friedman, *supra* note 228, at 587.

235. PORWANCHER, *supra* note 228, at 12; *see also* Abbott, *supra* note 228, at 10; Roalfe, *supra* note 228, at 297.

236. *See* PORWANCHER, *supra* note 228, at 12.

237. *See* Abbott, *supra* note 228, at 10.

238. Friedman, *supra* note 228, at 588; Roalfe, *supra* note 228, at 294 (five decades); *id.* at 297.

239. *See* Friedman, *supra* note 228, at 588.

240. *Id.*

241. *See* Fishman & Boston, *supra* note 228, at 13; Friedman, *supra* note 228, at 588.

242. Friedman, *supra* note 228, at 588.

243. *See infra* Section III-B.

244. *See* Fishman & Boston, *supra* note 228, at 12-13.

245. *See* Rahl, *supra* note 228, at 6; *see also* Fishman & Boston, *supra* note 228, at 12.

resources.[246] Closer to his heart, he established a friendly epistolary rapport with Oliver Wendell Holmes Jr., who shared his interest in the Anglo-American tradition of common law, and which rapport evolved from mentorship into a relation of equals as the years passed and Wigmore's own eminence became ever more apparent.[247] It appears vindicated in 1910 when Wigmore dedicated his *Pocket Guide of Evidence* to Holmes as "Justice of the Supreme Court of the United States in Grateful Acknowledgment of Lofty Ideals Voiced and Exemplified for Our Profession and of Many Tokens of Kindness shown to the Author."[248] For his part, after expressing humble appreciation, Holmes proceeded to grouse about Wigmore's friendly association with the Chief Justice of New Hampshire Charles Cogswell Doe, whom Holmes accused rightly of "pirat[ing]" some of his writings.[249]

Wigmore's interest in the practical applications of law found purchase in the emerging sciences of sociology and criminology, which he worked extensively to integrate in the organs and practice of the law.[250] The American Institute of Criminal Law & Criminology and the ABA Section on Criminal Law emerged apace under his auspices.[251] In 1910, he had founded Northwestern's own *Journal of Criminal Law & Criminology*, much as he had been amongst the founders of Harvard's law review over two decades prior.[252] Yet for all his interest in newfangled theories of criminal and social science,[253] Wigmore's eye never strayed too far from historical context: in 1912, Professor Albert Kocourek, a close colleague at Northwestern, observed that "Wigmore with the historian's vision of the mutability of legal institutions, and of the persistence of well-defined cycles of development in social affairs, has recognized that our legal system is in a transitional stage of evolution, the embryotic course of which is mirrored in the legal history of Rome."[254] In 1913, continuing his lifelong quest at systematization of the law, Wigmore released his *Principles of Judicial Proof as Given by Logic, Psychology, and General Experience, and Illustrated in Judicial Trials*, commenting that "the book aspires to offer, though in tentative form only, a novum organum for the study of Judicial Evidence."[255]

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246. *See* Fishman & Boston, *supra* note 228, at 12; Friedman, *supra* note 228, at 588-89; Ruder, *supra* note 228, at 3.

247. *See* Fishman & Boston, *supra* note 228, at 12.

248. Reid, *supra* note 228, at 529.

249. *Id.* at 529-30.

250. *See* Roalfe, *supra* note 228, at 281-83.

251. *Id.*

252. *See* Fishman & Boston, *supra* note 228, at 13; Friedman, *supra* note 228, at 588; Roalfe, *supra* note 228, at 278.

253. *See* Roalfe, *supra* note 228, at 281-82.

254. Albert Kocourek, *John Henry Wigmore: A Personal Portrait*, 24 GREEN BAG 3 (1912), *reprinted in* 13 ILL. L. REV. 340, 342 (1918) [hereinafter Kocourek, *A Personal Portrait*].

255. Fishman & Boston, *supra* note 228, at 14 (quoting JOHN HENRY WIGMORE, THE PRINCIPLES OF JUDICIAL PROOF AS GIVEN BY LOGIC, PSYCHOLOGY, AND GENERAL EXPERIENCE, AND ILLUSTRATED IN JUDICIAL TRIALS 1 (1913)); *see* Friedman, *supra* note 228, at 588; Roalfe, *supra* note 228, at 288 (quoting same). The reference of *novum organum*, or a

Then came the War. Wigmore volunteered for service upon taking a leave of absence from Northwestern, and was commissioned under joint assignments to the Provost Marshall General and Judge Advocate General's offices as a major, rising to the rank of colonel before his honorable discharge.[256] His then secretary, Sarah B. Morgan, who returned to civilian life with him to serve for the rest of his career,[257] recalls the extraordinary hours Wigmore worked between his "many and varied tasks," until Mrs. Wigmore put an end to Morgan's late-night attendance, although the wife could not do the same for her husband.[258] After the War's end, Wigmore received the Distinguished Service Medal for his efforts.[259] Yet even his military service yielded scholarship: amongst others publications,[260] Wigmore's *Source-Book of Military and War-Time Legislation* of 1919 was widely regarded as a revolution in the study of the field.[261] So too did he keep up his unflagging work for Northwestern, even during the War.[262] Although much of academia and the bench has ever regarded him as Professor or Dean Wigmore,[263] the man's titular preference was the colonelcy that he had earned in defense of his country.[264]

"new approach," refers foremost to Francis Bacon's *Novum Organum* of 1680, which sought to update the practice of systematic logic, addressing Aristotle's works collected as the *Organum* laying out the precepts of logical inference.

256. *See* Morgan, *supra* note 228, at 461; Roalfe, *supra* note 228, at 295.

257. Morgan, *supra* note 228, at 461.

258. *Id.*

259. Roalfe, *supra* note 228, at 295; *see* 32 C.F.R. § 578.11 (2021) ("The performance must be such as to merit recognition for service which is clearly exceptional. Exceptional performance of normal duty will not alone justify an award of this decoration.").

260. *See, e.g.*, John Henry Wigmore, Abrams v. U.S.*: Freedom of Speech and Freedom of Thuggery in War-Time and Peace-Time*, 14 ILL. L. REV. 539 (1920); John Henry Wigmore, *Suggested Memorandum on War Service*, 3 A.B.A. J. 341 (1917); John Henry Wigmore, Editorial Note, *The Lawyer's Honor in War-Time,* 12 ILL. L. REV. 117 (1917).

261. U.S. WAR DEPARTMENT COMMITTEE ON EDUCATION AND SPECIAL TRAINING, A SOURCE-BOOK OF MILITARY LAW AND WAR-TIME LEGISLATION (John Henry Wigmore ed. 1919); *see* Roalfe, *supra* note 228, at 290.

262. Morgan, *supra* note 228, at 461.

263. *See* David Werner Amram, Editorial Note, *John H. Wigmore*, 67 U. PA. L. REV. 80, 81 (1919) ("He will, however, to those who really know him, never be Colonel Wigmore. Such titles may well be reserved for lesser men. Neither shoulder straps nor military title have added anything to the distinction which his native genius long since conferred upon him. We shall think of him as Professor Wigmore, the great scholar and teacher, author and editor, or simply as Wigmore, a fountain of energy and inspiration . . . ."); *e.g.*, Radiant Burners, Inc. v. Am. Gas Assoc., 320 F.2d 314, 318 (7th Cir. 1963) ("Dean Wigmore"); United States v. Bryan, 339 U.S. 323, 331 (1950) (same);.

264. Inbau, *supra* note 228, at 9 ("The range of my discussions with the 'Colonel'—which I, as well as many others, always called him in deference to his choice of this Army Reserve title to that of Dean—went beyond technical subjects."); *see* Friedman, *supra* note 228, at 589 ("He rose to the rank of colonel, a title he continued to relish long after returning to academia . . . ."); Roalfe, *supra* note 228, at 299 ("This final resting place [at Arlington] not only gave recognition to Wigmore's wartime contribution but, at the same time, took account of the fact that he sometimes seemed to feel a greater pride when identified as 'Colonel,' a title affectionately used by many of his friends, than as the author of *The Treatise on Evidence.*").

In the 1930s, Wigmore's penchant for systematization alighted upon another target, the comparative law of different nations, stirred by his deep inculcation in the newly-wrought Japanese legal system in his early career.[265] (Indeed, he published his first installment in the series *Materials for the Study of Private Law in Old Japan* in 1892 during his appointment at Keio,[266] together with numerous other works on Japan over his career.[267]) The result was his magisterial three-volume *Panorama of the World's Legal Systems*, providing a survey of sixteen different countries' jurisprudence.[268] Once again, a practical approach was at the heart of Wigmore's work: the "*Panorama*'s intent was to popularize the study of comparative law and to familiarize legal scholars with some of the patterns of law that appeared in various legal systems."[269] So betaken was Wigmore with his mission that following his retirement as dean of Northwestern,[270] he returned to Japan in 1935 to oversee the continuing project of collating and translating Tokugawan-era legal sources that he had set in motion over forty years before.[271] This only continued his long interest in the subject that had been roused by his early sojourn and never waned.[272]

As may be apparent, from the start of his career, Wigmore's "flood of writing, journalistic as well as legal, continued unabated."[273] Never in his life did Wigmore retire from the study of the law; it seemed he could not.[274] To call Wigmore merely prolific denies him his due: the *Northwestern University Law Review* catalogues nearly one thousand publications over the course of his lifetime, nigh unto his demise, equating to an average of sixteen-odd items every year he was a lawyer, spanning seven decades.[275] Roalfe writes: "The sheer magnitude of the achievement is almost impossible fully to appreciate until one has seen the total brought together in one place and it is realized that it occupies more than 18 feet of shelf space or an entire section of standard library shelving."[276] Indeed, Wigmore's final work, *Bullets or Boycotts: Which Shall be the Measure to Enforce World Peace?*, was published posthumously.[277]

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265. *See* Abbott, *supra* note 228, at 13-14.

266. Schwerin, *supra* note 228, at 52; *see* Roalfe, *supra* note 228, at 288.

267. *See generally* Schwerin, *supra* note 228.

268. *See* Fishman & Boston, *supra* note 228, at 14-15; Abbott, *supra* note 228, at 13-15; Roalfe, *supra* note 228, at 289.

269. Fishman & Boston, *supra* note 228, at 15 (citing Abbott, *supra* note 228, at 13).

270. *See* Rahl, *supra* note 228, at 4, 7.

271. Abbott, *supra* note 228, at 12-3.

272. *See* Roalfe, *supra* note 228, at 295 (also noting his responsibility for organizing the ABA Section of International and Comparative Law); Fishman & Boston, *supra* note 228, at 11.

273. Friedman, *supra* note 228, at 588.

274. *See* Roalfe, *supra* note 228, at 299; *see also* Friedman, *supra* note 228, at 588 (noting perhaps mordantly that Wigmore was "[s]till active in his early 80s," as he turned eighty only a month before his demise).

275. Schwerin, *supra* note 228; *accord* Roalfe, *supra* note 228, at 291 (providing a similar computation).

276. Roalfe, *supra* note 228, at 291.

277. Schwerin, *supra* note 228, at 51; *see* Roalfe, *supra* note 228, at 299.

Wigmore was returning from a meeting of the editorial board of the *Journal of Criminal Law & Criminology* he had founded so many years before when he met a sudden death in a "freakish"[278] taxicab collision.[279] It was April 20, 1943, and Wigmore was eighty years of age.[280] Wrote his long-time friend and colleague Albert Kocourek in memoriam:[281] "But for a stupid mischance he might have lived into his nineties like his senior contemporaries, Holmes and Pollock. *Fata obstabant*. In a short hour the world of legal science shrank to a small and poorer dimension."[282] Perhaps Kocourek might have added: *sic transit gloria mundi*.[283]

B. A Legal Magnum Opus for the Twentieth Century

Not to be outdone by Sir William,[284] Edmund M. Morgan and John MacArthur Maguire write in Wigmore's own natal *Harvard Law Review* in 1937 that during the preceding half century, "these two, James Bradley Thayer and John Henry Wigmore, bestrode the narrow world of evidence like a colossus."[285] Having digressed upon the life of Wigmore, what of Thayer?[286]

James Bradley Thayer has been mentioned already as an authority in the law of evidence and mentor of the young Wigmore.[287] But in Thayer's much-heralded *Preliminary Treatise on Evidence at the Common*

278. Friedman, *supra* note 228, at 589.

279. Inbau, *supra* note 228, at 8; Roalfe, *supra* note 228, at 276-277; *see also* Fishman & Boston, *supra* note 228, at 16; Friedman, *supra* note 228, at 589.

280. *See* Fishman & Boston, *supra* note 228, at 16; Roalfe, *supra* note 228, at 299.

281. *See* Schwerin, *supra* note 228, at 17 ("Professor Albert Kocourek (1875-1952), the outstanding authority on jurisprudence, . . . was one of Wigmore's closest associates on the faculty of the Law School."); Kocourek, *A Personal Portrait*, *supra* note 254, at 342; *id.* at 345 ("To say of Mr. Wigmore that he is unaffected, generous, noble, an untiring worker, a stanch friend, a valuable citizen, a great lawyer, an accomplished jurist, a cultured gentleman, is to employ the stock nouns and adjectives of obituary literature.").

282. Albert Kocourek, *John Henry Wigmore*, 27 J. AM. JUD. SOC'Y 122, 124 (1943) [hereinafter Kocourek, *In Eulogy*]; *see also* Fishman & Boston, *supra* note 228, at 16 (quoting Kocourek); Roalfe, *supra* note 228, at 299 (same). The Latin phrase translates to "Fate stood in the way."

283. The Latin maxim translates to "thus passes the glory of the world." *See* Jaksha v. State, 385 N.W.2d 922, 925 (Neb. 1986) (rendering as "so passes away the glory of the world"); *e.g.*, State *ex rel.* Brotherton v. Blankenship, 207 S.E.2d 421, 438 (W. Va. 1973) (Neely, J., dissenting) ("The history of liberty is the history of legislatures. When once the Legislature has been divested of its traditional power of the purse it will stand like Stonehenge as a useless and incomprehensible monument to a past era. *Sic transit gloria mundi*."); *see also, e.g.*, Jones v. Harshbarger, 303 S.E.2d 668, 685 (W. Va. 1983) (quoting *Brotherton* as "conclud[ing] with magnificent grandness").

284. *See supra* note 227.

285. Morgan & Maguire, *supra* note 232, at 909 (referring to WILLIAM SHAKESPEARE, THE TRAGEDY OF JULIUS CÆSAR, act I, sc.ii, *ll.*143-44).

286. Alas, this Article is not a tribute to Thayer as such, but such articles have rightly have been written as well. *See generally, e.g.*, G. Edward White, *Revisiting James Bradley Thayer*, 88 NW. U. L. REV. 48 (1993); Morgan & Maguire, *supra* note 232; Hook, *supra* note 232.

287. *See supra* text accompanying notes 227 & 232.

Law of 1898[288] may be seen vividly a secular John the Baptist[289] preceding Wigmore's montane sermon on evidence of 1904.[290] Indeed, Thayer "demonstrated the insufficiency of all previous studies in this field, and pointed the way for all future scholars."[291] This is because Thayer finally, at the dawn of the twentieth century, laid bare the incoherence of existing precedents and treatises both and the concomitant need for assimilating them into a principled whole and yet, the work he penned was not one addressing that need but of an historical and philosophical bent.[292] The treatise interrogates the very concept of evidence and the development thereof from the earliest days of English law through the then-present,[293] yet offers only desultory advice thereafter to the practitioner. Critics noticed; the *Yale Law Journal* Book Review observes that "the book is, perhaps, quite as much an attempt to mould the law of evidence as to state it."[294] It continues: "From this it results that its value is as a source of suggestion and as an aid to clearer thinking on some of the difficult problems of evidence rather than as a statement of the law as it is, to be studied as such."[295] Recognizing this, Thayer offers a modest apology: "I have a good hope, when the present volume is completed, of supplementing it, before long, by another, in similar form but of a more immediately practical character, giving a concise statement of the existing law of evidence."[296] But that was not to be writ by him, for Thayer died but a few years later in 1902, leaving his intended work undone.[297]

It was Thayer's disciple instead that would see his hope given shape; it remained to Wigmore "to present the complete picture,"[298] though Wigmore did respectfully dedicate his work to "the memory of the public services and the private friendship of two masters of the law of evidence Charles Doe of New Hampshire and James Bradley Thayer of Massachusetts."[299] But the resulting statement was not to be "concise," as Thayer had imagined.[300] Roalfe has calculated that in the first edition of 1904 to 1905, Wigmore had collected 40,000 citations to legal opinions, which already mind-boggling number expanded to 55,000 in the second

288. THAYER, *supra* note 29.

289. *Cf. Matthew* 3:3; *Mark* 1:2-3.

290. *See* Holdsworth, *supra* note 227, at 453 ("To some extent, as Dean Wigmore says, the trail had been blazed by Thayer's pioneer treatise"); Epaphroditus Peck, *The Rigidity of the Rule Against Hearsay*, 21 YALE L.J. 257, 258 (1912) ("This academic work of Professor Thayer laid the foundation for the magnum opus of Professor Wigmore").

291. Morgan & Maguire, *supra* note 232, at 909.

292. *See* THAYER, *supra* note 29, at 3-5; *see also* Morgan & Maguire, *supra* note 232, at 909.

293. THAYER, *supra* note 29, at 7-182.

294. *Book Review*, 8 YALE L.J. 216, 217 (1899).

295. *Id.*

296. THAYER, *supra* note 29, at 5.

297. Hook, *supra* note 232, at 8.

298. Holdsworth, *supra* note 227, at 453; *accord* Hook, *supra* note 232, at 5 ("The neglected treatise was completed by Thayer's student, John Henry Wigmore."); *see also* Peck, *supra* note 290, at 258.

299. Roalfe, *supra* note 228, at 284 n.51.

300. THAYER, *supra* note 29, at 5.

edition of 1923, and to 85,000 in the third of 1940.[301] A supplemented by statutory and literary references, the third edition — the last revised by Wigmore himself before his untimely death — comprises 7,324 pages, and Roalfe offers visual proof of the size, noting that the complete oeuvre taken together occupies a full "four and one-half feet of shelf space."[302] Kocourek, writing later, estimated the necessary work on the first edition alone to have involved "10 years of monastic toiling,"[303] whilst Wigmore himself placed it at fifteen years, crediting his indefatigable wife as his "devoted co-laborer for fifteen years without whose arduous and skillful toil this work could never have been completed."[304] Although duly accepting Wigmore's attribution to his wife, Roalfe identified several other factors that recommended Wigmore for such an Atlantean burden.[305] These he identifies as Wigmore's prodigious speed at reading, his equal powers of concentration on the task at hand, a great skill and interest in systematic organization, and "an unusual capacity for sustained effort."[306]

C. The Miraculous Parthenogenesis of a Confidentiality Requirement

Before turning fully to Wigmore's parthenogenesis, it must be noted that no less a personage in ethical philosophy than Jeremy Bentham staunchly opposed the whole notion of privilege itself,[307] as Wigmore himself (again, commendably) recorded.[308] Bentham makes short work of the concept of the *pundonor* that was only recently extinct as of his writing of 1827.[309] The greater weight of his argument is against the modern client-oriented protection, arguing at base that an innocent man has nothing to fear, and a guilty man should not be abetted by the law to secure his freedom despite his guilt.[310] Bentham also adverts to the then-existing discrepancy between legal counsel and other confidential (i.e. professional) relationships such as doctors, who at the time enjoyed no privilege,[311] though that omission has since been filled.[312] Attention is

301. Roalfe, *supra* note 228, at 283-84.
302. *Id.* at 283.
303. Kocourek, *In Eulogy*, *supra* note 282, at 123.
304. Roalfe, *supra* note 228, at 284 n.51.
305. *Id.* at 283.
306. *Id.*
307. BENTHAM, *supra* note 181, at 302-25.
308. WIGMORE, *supra* note 12, § 2291, at 3199-3201.
309. *See* BENTHAM, *supra* note 181, at 302-03 ("The law adviser is neither to be compelled, nor so much as suffered, to betray the trust thus reposed in him. Not suffered? Why not? Oh, because to betray a trust is treachery; and an act of treachery is an immoral act."); *see also supra* Section II-A-2 (detailing the development and deprecation of the attorney's *pundonor* privilege).
310. *Id.* at 303-05.
311. BENTHAM, *supra* note 181, at 306.
312. *See* Shuman, *supra* note 38 (analyzing the physician-patient privilege under Wigmore's protocol).

drawn to the admittedly knotty legal problem that animated so many early English cases in discerning whether an attorney is acting in a professional capacity or a familiar one; Bentham places great weight on the supposed impossibility of dissecting the one from the other.[313] And Bentham preemptively contemns the edict of Lord Brougham (which, in fairness, did not quite yet exist in 1827) that the client be free to share his story with counsel in safety:

> Not with safety? So much the better. To what object is the whole system of penal law directed, if it be not that no man shall have it in his power to flatter himself with the hope of safety, in the event of his engaging in the commission of an act which the law, on account of its supposed mischievousness, has thought fit to prohibit? The argument employed as a reason against the compelling such disclosure, is the very argument that pleads in favour of it.[314]

In the end, Bentham's argument, elegantly laid out as it is and aided by sophisticated rhetoric, reduces to its first principle: that an innocent man needs no privilege, and a guilty man ought not be abetted by the law.[315] Wigmore admits that "[a]t first sight, the Benthamic argument seems irresistible."[316] The essential flaw in Bentham's reasoning corresponds to the fundamental axiom of Anglo-American criminal law: that no man is guilty until proven so,[317] and thus the protections of the privilege are necessary to protect the innocent lest they be wrongly found guilty.[318] The Supreme Court traces the origins of this axiom to Ancient Greece and Rome, and notes that Greenleaf locates its origins in the Bible itself.[319] And in non-criminal matters, the security of legal advice serves to deter many unworthy causes from being brought in the first place.[320] Despite Bentham's justifiably heralded legacy, his commentaries on the law of privilege do not stand up to scrutiny, and failed to sway the scholars and jurists of his century, who universally accepted the need for the privilege.[321]

Wigmore parted ways with Bentham as well, but perhaps not so much as his predecessors.[322] Indeed, Morgan & McGuire observe that

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313. *Id.* at 306 ("Quære, by what sign to know when it is the attorney who is present, and when it is the friend? In the case of the counsel, there might have been less difficulty: the professional robe, by being off or on, might distinguish the counsel from the friend.").

314. *Id.* at 310.

315. *Id.* at 303-307.

316. WIGMORE, *supra* note 12, § 2291, at 3202.

317. Wolfish v. Levi, 573 F.2d 118, 124 (2d Cir. 1978) ("Fundamental to the Anglo-American jurisprudence of criminal law is the premise that an individual is to be treated as innocent until proven guilty by a jury of his or her peers.").

318. *See* WIGMORE, *supra* note 12, § 2291, at 3202-03; *see also* BLACKSTONE, *supra* note 71, at 352 ("[A]ll presumptive evidence of felony should be admitted cautiously: for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer.").

319. Coffin v. United States, 156 U.S. 432, 453-56 (1895).

320. WIGMORE, *supra* note 12, § 2291, at 3203.

321. *See supra* Section II-B.

322. *See supra* notes 316-320.

"Wigmore gave to America a critique resembling that of Bentham in England, but in far superior and more comprehensive fashion."[323] Wigmore accepts readily that, historically, the supposition of attorney-client secrecy was so presumptive it need not even be stated.[324] What initially differs from prior treatises is his restatement of the rationale underpinning not just attorney-client privilege but any privileges whatsoever, *à la* Bentham. Wigmore explicated:

> Looking back at the principle of Privilege, as an exception to the general liability of every person to give testimony to all facts inquired of in a court of justice, and having in view that preponderance of extrinsic policy which alone can justify the recognition of any such exception (ante, §§ 2192, 2197), four fundamental conditions may be predicated as necessary to the establishment of a privilege against the disclosure of communications between persons standing in a given relation. (1) The communications must originate in a confidence that they will not be disclosed; (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) The relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation[325]

Only the last of these principles stray from those of Lord Brougham. The first, if confidentiality is properly read as a question of a professional arrangement, faithfully replicates the trust that the Lord Chancellor explained must attend legal communications lest "every one would be thrown upon his own legal resources."[326] So too the second recapitulates the requirement than an attorney so trusted be acting in a legal capacity.[327] With the third, Wigmore did not advance the argument, for he agreed, contra Bentham, that the attorney-client privilege ought to be recognized.[328] But in the fourth, Wigmore proposed the basis of his divisive innovation: that a balancing test must be imposed as to importance of inadmissibility versus its proof-making value. Armed with such a test, he could impose burdens on the privilege in the guise of tests of "how important" a communication was, versus the undisputed value of truth and full disclosure to the judicial process. In short, the balancing test made viable in principle the idea of violating a reasonably intended privilege involuntarily if the utterer or proponent did not sufficiently demonstrate the importance of its inviolacy. From this, Wigmore derived and promulgated the pithy test for the attorney-client privilege that would underpin and animate so many cases even unto the early days of

323. Morgan & Maguire, *supra* note 232, at 909.

324. WIGMORE, *supra* note 12, § 2290, at 3194 ("Clearly the attorney and the barrister are under a solemn pledge of secrecy, not less binding because it is implied and seldom expressed.").

325. WIGMORE, *supra* note 12, § 2285, at 3185.

326. Greenough v. Gaskell, (1833) 1 Myl. & K. 98, 39 Eng. Rep. 618 (Ch.) (quoted *supra* note 133).

327. *See supra* notes 203-210 and accompanying text.

328. WIGMORE, *supra* note 12, § 2291, at 3202-04.

the twenty-first century:[329]

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relevant to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the client waives the protection.[330]

The intersection of item four and eight enact Wigmore's revolution in privilege, construing any lapse in perfect secrecy (as Wigmore wrongly conceived confidentiality) as a voluntary waiver of the privilege, apparently by a legal fiction,[331] given even Wigmore saw matters of thieves or eavesdroppers were in fact involuntary:

> All involuntary disclosures, in particular, through the loss or theft of documents from the attorney's possession, are not protected by the privilege, on the principle (post, § 2326) that, since the law has granted secrecy so far as its own process goes, it leaves to the client and attorney to take measures of caution sufficient to prevent the overhearing of third persons ; and the risk of insufficient precautions is upon the client. This principle applies equally to documents.[332]

> The law provides subjective freedom for the client by assuring him of exemption from its processes of disclosure against himself or the attorney or their agents of communication. This much, *but not a whit more*, is necessary for the maintenance of the privilege. Since the means of preserving secrecy of communication are entirely in the client's hands, and since the privilege is a derogation from the general testimonial liability and should be strictly construed, it would be improper to extend its prohibition to third persons who obtain knowledge of the communications. One who overhears the communication, whether with or without the client's knowledge, is not within the protection of the privilege. The same rule ought to apply to one who surreptitiously reads or obtains possession of a document in original or copy.[333]

Wigmore was wrong; waiver of a right requires a voluntary and knowing decision, or else it is compulsion.[334] Still, there was some textual provender with which Wigmore worked his personal will.[335] Taylor, of

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329. *See* Sunshine, *supra* note *, at 646 n.39 (citing the majority of circuits as adopting Wigmore's test prior to 2008 and the enactment of Fed. R. Evid. 502).

330. WIGMORE, *supra* note 12, § 2292, at 3204 (oblique case rendered in Roman).

331. *Cf.* Edwards v. Arizona, 451 U.S. 477, 483 (1981) ("The Court specifically noted that the right to counsel was a prime example of those rights requiring the special protection of the knowing and intelligent waiver standard."); Brady v. United States, 397 U.S. 742, 748 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."); Miranda v. Arizona, 384 U.S. 436, 475 (1966); Pate v. Robinson, 383 U.S. 375, 384 (1966); *see also* EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE 508 (Am. Bar Assoc. 6th ed. 2017) ("In other domains of the law waiver entails a knowing, voluntary, conscious and intelligent relinquishment of that right by the holder thereof.").

332. *Id.* § 2325, at 3251.

333. *Id.* § 2326, at 3251-52 (emphasis added).

334. *Cf.* sources cited *supra* note 331.

335. *See, e.g.*, WEEKS, *supra* note 22, § 143, at 305 (No privilege would apply "where

course, in passing, had agreed,[336] even if all his contemporaries did not, and rebuked him.[337] Recall also the aside in Greenleaf as to eavesdroppers;[338] once this was combined with the principle that an exchange with counsel in the known presence of adversaries or third parties could not restrict them,[339] the admixture yielded a potent poison. Given the philosophical underpinnings that Wigmore had enunciated, what difference did it make that the third party was intended or unintended?[340] The ineluctable result of this questionable line of induction was evident: should any person other than the client and attorney (and the attorney's necessary agents, Wigmore allowed,[341] following his predecessors recognizing clerks and the like[342]) gain knowledge of the privileged conversation, the privilege would not survive the inadvertent dissemination.[343] It was thus incumbent on the proponent of the privilege to ensure none other come to know the secrets imparted should she wish the privilege be preserved.[344] This was a marked departure from the stance of the lawbooks preceding Wigmore, where it was assumed (*pace* the stray comment in Greenleaf[345] and the universally denounced dicta of Taylor[346]) that a conversation with counsel was to be kept secret, that the courts should enforce such, and only the deliberate inclusion of a free agent whom all knew might testify at his will could compromise such professional confidentiality.[347] Again, none thought that a shouted exchange with an attorney across a public house where all might obviously hear could accrue privilege, but that was because no sane client could imagine it would be insulated from the body of evidence given all the ears that heard and might testify.[348] Wigmore's innovation was to eradicate the reasonable subjective expectation of the client, and install in its place an objective test of whether the communication in fact was and remained secret to all but client, counsel,

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the matter communicated was not in its nature private, and could in no sense be termed the subject of a confidential disclosure . . . The test seems to be: Are the communications confidential? Are they necessary in the course of business?"). Even here, the paired questions suggest that the question of "confidentiality" is more of the nature of whether the communication is made in a confidential or professional relationship, before proceeding to inquire whether an exemption — that is a communication not consistent with the confidential or professional relationship — applies. It must be admitted, however, that the comment as to privacy provides ample fodder, even qualified as it is by the subsequent test.

336. *See supra* notes 217-218 and accompanying text.
337. *See supra* notes 219-224 and accompanying text.
338. *See supra* note 213and accompanying text.
339. *See supra* notes 193-196.
340. WIGMORE, *supra* note 12, §§ 2325-26, at 3521-22.
341. *Id.* § 2326, at 3251-52; *see* § 2320, at 3219.
342. *See supra* notes 198-200.
343. WIGMORE, *supra* note 12, §§ 2325-26, at 3521-22.
344. *Id.*
345. *See supra* note 213 and accompanying text.
346. *See supra* notes 217-218 and accompanying text.
347. *See supra* note 186.
348. *See supra* notes 191-192, 197.

and their appendages.[349]

Bentham's is a broadside repudiation of Lord Brougham and the rationale espoused in *Greenough* and *Bolton*. That reasoning had been based in ensuring the client's perceived safety in divulging his sins to a legal confessor, that competent representation might be had.[350] Yet Wigmore had the audacity — or, more amiably put, the self-possession — to coolly quote the late Lord Brougham[351] in support of his theorem that the client's expectation and reliance were irrelevant should those divulgences travel further, whether by accident, her own fault, her attorney's, or a malefactor's.[352] That pronouncement simply disregarded the real-world assessments of virtually every nineteenth century treatise and Lord Brougham himself.[353] Wigmore, however, concluded his analysis of Bentham, a similarly philosophical soul, thus:

> [T]he privilege remains an anomaly. Its benefits are all indirect and speculative; its obstruction is plain and concrete. Even the answers to Bentham's argument concede that it is accurate and well-founded in its application to a certain proportion of cases. It is worth preserving for the sake of a general policy; but it is none the less an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.[354]

Some indication of Wigmore's motivations may be gleaned from his many friends and eulogists. His much-cited confidante Kocourek explains: "He insists on progress, and progress means for him understanding and power. Anything which opposes this progress is cast aside. Individuals here mean nothing, and the idea is everything. It is easy to be virtuous."[355] Evan Alfred Evans, then a judge of the Seventh Circuit, adds: "He waged a ceaseless war on imperfect law, or law as is, but which needed growth and development. He was the persistent foe of laws that lagged behind the advance of commerce or the accepted course of conduct in any other field."[356] Roalfe, his archetypal biographer, summarizes: "Whenever he encountered a situation which called for a remedy he was apparently impelled to work out a solution or at least devise a step forward by way of improvement. Usually, he was not satisfied merely with a written attack on the problem. He went into action . . . ."[357] The parthenogenesis of Wigmore is not a product of self-realization, but of problem-solving, as Roalfe concludes: "[B]ecause of his inherent modesty he seldom, if ever, stood in the way of the goal he

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349. *See supra* notes 332-333.

350. Greenough v. Gaskell, (1833) 1 Myl. & K. 98, 39 Eng. Rep. 618 (Ch.); Bolton v. Corp. of Liverpool, (1833) 1 Myl. & K. 88, 39 Eng. Rep. 614 (Ch.).

351. WIGMORE, *supra* note 12 § 2291, at 3197.

352. *Id.* §§ 2325-26, at 3521-22.

353. *See supra* notes 219-223 and accompanying text. *Contra* TAYLOR 2D, *supra* note 79, § 843, at 740-41; *see also* WEEKS, *supra* note 22, § 163, at 348.

354. WIGMORE, *supra* note 12, § 2291, at 3204.

355. Kocourek, *A Personal Portrait*, *supra* note 254, at 346.

356. Evan Alfred Evans, *On Behalf of the Bench*, 34 J. CRIM. L. & CRIMINOLOGY 75, 76 (1943) (quoted in Roalfe, *supra* note 228, at 294 n.118).

357. Roalfe, *supra* note 228, at 294.

envisioned by making his personal aggrandizement the first consideration. He kept his gaze on the objective and not on himself."[358] Once Wigmore had settled upon the proper logical point to be achieved, the individual applications, or indeed his own acclaim, meant little compared to the promulgation of the austere principle.

Drysdale rightly observes that the feeble historical basis for Wigmore's parthenogenesis can best be considered one of misapplied terminology: earlier treatises spoke of "confidential communications," yet they did not mean communications made in secret, but rather communications made within the context of a confidential — that is, professional — legal relationship.[359] This is well illustrated by Weeks, who, alongside many references to "confidential communications,"[360] writes that "communications between an attorney and his client, through an unprofessional person, are privileged; but if they are not wholly of a professional or confidential nature, it seems that the privilege will not be allowed," seemingly equating confidential with professional: that is, they need not be professional *and* confidential, belying the hypothesis there were a difference between the two to the authors of the time.[361] Even Weeks's most helpful comments on confidentiality for Wigmore — writing but a few years before that eminence — envision confidentiality as a test of the professional relationship rather than the communication's circumstantial secrecy.[362] Seizing upon the odd turn of phrase does little in the face of the basis of privilege in the confidence one resides in a professional attorney.[363] A confidence is a trust;[364] secrecy is only the expected corollary.[365] There is no real objection that Wigmore's requirement of confidentiality as a test of the communication's secrecy and its maintenance as secret was an innovation springing from his pursuit of logical perfection rather than an exegesis of the common law,

358. *Id.*

359. *See Drysdale on Confidentiality*, *supra* note 27, § 6:3 & n.5.

360. *E.g.*, WEEKS, *supra* note 22, § 139, at 289, § 143, at 301, § 144, at 306, § 150, at 317, § 151, at 323-26, § 158, at 337, § 160, at 339, § 161, at 342, § 168, at 361, § 171, at 365, § 176, at 373.

361. WEEKS, *supra* note 22, § 144, at 307. Even here, those versed in the discipline of propositional logic might observe that a phrase in the form $\neg(P \vee Q)$, as opposed to $\neg P \vee \neg Q$, is equivalent to $\neg P \wedge \neg Q$ under De Morgan's laws. But even legal authors in English do not write with parentheses, so courts are best served following the ordinary meaning of the text. *See* Schane v. Int'l Bhd. of Teamsters Union, 760 F.3d 585, 589-90 (7th Cir. 2014) ("In propositional logic, this move—the rule of inference that not (X or Y) is equivalent to not X and not Y—is known as one of 'De Morgan's Laws.' See Lawrence M. Solan, *The Language of Judges* 49 (1993). Formal notation aside, the point is merely that determining the meaning of or in a sentence is not just a matter of declaring that the word is disjunctive. Context matters.").

362. WEEKS, *supra* note 22, § 143, at 305 (quoted *supra* note 335).

363. *See supra* note 133 (protecting all words and paper in any professional capacity); *see also* Section II-C (considering major nineteenth-century treatises other than Bentham).

364. OXFORD ENGLISH DICTIONARY 312, *confidence*, noun sense 1 (Oxford Univ. Press 2d ed. (compact) 1989) ("The mental attitude of trusting in or relying on a person or thing; firm trust, reliance, faith.").

365. *See, e.g.*, WIGMORE, *supra* note 12, § 2290, at 3194.

as numerous others have concluded.[366]

IV. WIGMORE'S PROBLEMATIC LEGACY ON CONFIDENTIALITY

The purpose of this history is not to critique Wigmore himself for his choice, and the numerous other authors that have advanced the history of the privilege subsequent to Wigmore need not be reduplicated.[367] Indeed, the earlier encomia to Wigmore and his ultimate hegemony might give the false impression he was without critics upon publication of his magnus opus. Yet even those lauding Wigmore's "monumental contribution to the law of privileges" in the decades that immediately followed nonetheless allowed that "[i]t may be that Wigmore . . . has conduced to the current confusion by his emphasis on strictly utilitarian bases for the privileges—bases which are sometimes highly conjectural and defy scientific validation."[368] Roalfe identifies a series of frequent complaints registered by Wigmore's contemporaries, most notably his "advocacy of certain principles of law by statements that were neither logical nor supported by the courts."[369] But in the balance, Roalfe (as with other criticisms) concluded that Wigmore's iconoclastic approaches were constructive, forcing practitioners into better practice and encouraging courts to reexamine hoary old assumptions.[370]

Drysdale (and, presumably, Rice, who placed Drysdale's work in his epochal twentieth-century treatise) puts more weight than can be sustained in the omissions of earlier authorities: there is *some* meaning to confidentiality beyond mere identity with the attorney-client relationship. But the relation is one of reasonable expectancy of confidentiality enjoyed by the client, which animated the reasoning of Lord Brougham and all those who — as has been shown, everyone — credited his wisdom. To be confidential for purposes of attorney-client privilege, the communication must be made within the attorney's professional confidence, and nothing that happens thereafter — nor at-the-time unknown eavesdroppers — should dislodge that unassailable principle, other than the client's *intent* to make the privileged communication known generally. Negligence will not do; recklessness will not do; intentionality has legal meaning and is the only proper test under Lord Brougham's rationale.[371] Wigmore's complaint that any client will claim such an intent gets no mileage,[372] for of course *every* client *is*

366. *See, e.g.*, sources cited *supra* note 23.

367. *See supra* note 23.

368. Louisell, *supra* note 23, at 111-12; *accord* Gardner, *supra* note 23, at 458-59.

369. Roalfe, *supra* note 228, at 285.

370. *Id.* at 286.

371. The confusion has led to a strained meaning of "waiver" of privilege. *See* EPSTEIN, *supra* note 331 at 508-09 ("The term 'waiver' used to describe by what means the privilege has been lost is singularly infelicitous."); *see, e.g.*, Sunshine, *Common Interest*, *supra* note 16, at 834.

372. *See* WIGMORE, *supra* note 12, § 2327 at 638 ("A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation.").

entitled to expect secrecy, as Wigmore himself agreed.[373] He simply disagreed with the outcome in certain cases, and acted as a legislator unto himself to reform the law to comply with this sense of principle. Bentham, the great nullifier of privilege, might perhaps be heard whispering in Wigmore's ear.

The Wigmorean notion that privilege might be lost because of eavesdroppers, misdirected mail, or thieves was thus met with considerable disbelief.[374] Yet Wigmore prevailed, and accidental or intentional interlopers and felons were allowed to break the privilege under the common law of the United States.[375] Ultimately, Congress bestirred itself to demand a revision of the rule of attorney-client privilege, a power it has withdrawn from the judiciary and reserved to itself, of which this author has written at great length elsewhere.[376] Yet the revisions as approved did not address fully the matter of Wigmore's innovation of confidentiality as secrecy being a prerequisite to an assertion of privilege, and the costs to clients and the legal profession have continued apace.[377] To date, therefore, Wigmore's mistaken rule of requiring confidentiality qua secrecy is neither dead nor moribund, but unfortunately proves a vital dictate in modern cases, even in the wake of the reforms Congress demanded and approved.[378]

Such was Wigmore's influence that a mere three years after his publication the nation's then-leading law review might self-assuredly state that it makes no difference whether a communication was made to an attorney or not if there were a third party of any kind to abrogate the "confidence."[379] Recall the treacherous attorney, whom the nineteenth century sources agreed, *pace* Taylor, to be disabled from betraying his client.[380] Yet if Wigmore is taken as his word (as he undoubtedly was[381]), then counsel wishing to triumph in a betrayal need only surreptitiously

373. *Id.*

374. *See, e.g.*, Louisell, *supra* note 23, at 113-14 & n.58a (evincing contemporary disbelief); Roalfe, *supra* note 228, at 284-85 (summarizing same); *see also, e.g.*, Smith v. Armour Pharm. Co., 838 F. Supp. 1573, 1577 (S.D. Fla. 1993) (expressing continuing disbelief many decades later).

375. *See, e.g.*, *In re* Grand Jury Subpoena Served Upon Horowitz, 482 F.2d 72, 74-75 (2d Cir. 1973); *In re* Grand Jury Subpoena Served Upon Victor, 422 F. Supp. 475, 476 (S.D.N.Y. 1976).

376. *See* Notes of Committee on the Judiciary to Fed. R. Evid. 501, Senate Report No. 93–1277; *see also* FED R. EVID. 501; Sunshine, *Failing to Keep the Cat in the Bag*, *supra* note *, Part III.

377. *See* Sunshine, *Failing to Keep the Cat in the Bag*, *supra* note *, Part VI.

378. *See id.* at Part III.

379. Rodgers, *supra* note 204, at 70. ("Generally speaking, before the statement to the attorney will be accorded the dignity of privilege, it must be made in private. It must, in other words, be confidential and made under such circumstances as naturally call for confidence. . . . In all such cases, therefore, the statement may be proven the same as though made to one not an attorney or counselor."); *id.* at 71 ("The idea of privilege shields the attorney only as to confidential information. As to facts that are otherwise competent and proper, the attorney not only may testify, but can be compelled to do so.").

380. *See supra* notes 217-224 and accompanying text.

381. Chafee Jr., *supra* note 19; *see supra* text accompanying note 19.

install an eavesdropper or record a conversation — or simply supply professional confidences to a third party — to achieve that end through another. A legal adversary might hire skilled eavesdroppers to bug a legal office or burglars to steal an attorney's files, and Wigmore's rule would not exclude the fruits of these calculated, dastardly, and criminal devices.[382] Such a rule is pragmatically, ethically, and morally unjustifiable,[383] and it can be only Wigmore's literalistic dedication to his underlying logical principles and the outré nature of such issues in his time that might have led him to such an extravagant conclusion.[384] No more tenable, it has proven, is the idea that purported negligence by the attorney or client that allows for an eavesdropper or other later interceptor should be treated any differently than perfidious attorneys or thieves in the night.[385] Attorney-client privilege, as proposed by Lord Greenough, ought to follow the client's (reasonable) intent,[386] as surely as an assailant's intent follows the bullet.[387]

V. CONCLUSION

In his early and influential tome on mythology, Thomas Bulfinch quotes Lord Byron in describing Athena ("Pallas," another of her epithets) and her virginal emergence, equating them with the birth of America ("Columbia") herself:

> Can tyrants but by tyrants conquered be, and freedom find no champion and no child such as Columbia saw arise when she sprung forth a Pallas, armed and undefiled? Or must such minds be nourished in the wild, deep in the unpruned forest, 'midst the roar of cataracts, where nursing nature smiled on infant Washington? Has earth no more such seeds within her breast, or Europe no such shore? [388]

382. *See, e.g.*, *Armour Pharm. Co.*, 838 F. Supp. at 1577 (considering the hypothetical of a burglar of client files attempting to abrogate privilege and rejecting as unjust the outcome of privilege being lost in such circumstance).

383. *See id.*

384. *See* WIGMORE, *supra* note 12, § 2285, at 3185.

385. *See* Sunshine, *Failing to Keep the Cat in the Bag*, *supra* note *, Part IV.

386. As noted earlier, a client's *unreasonable* intent cannot support privilege: for example, the transmission of confessions to one's attorney at peak voice across a crowded public house. Nor could initial intent to consult with counsel in confidence protect the client's later apparent intent to disclose the matter—to return to the example, as if he were to proclaim his confidential conversation in a crowded public house. But an eavesdropper outside a lawyer's window, a burglar in the night, a mistakenly delivered letter, or a paper accidentally and improperly sent by a clerk, ought not defeat the presumption that the original confidences confided in the lawyer are to be kept inviolate, whatever their mishandling. To do otherwise would allow malpractice or malfeasance to accrue to the detriment of the client.

387. State v. Wynn, 180 S.E.2d 135, 139 (N.C. 1971) (characterizing as an "accepted principle of law"); *e.g.* Poe v. State, 671 A.2d 501, 503 (Md. 1996) (providing trial instructions).

388. GEORGE GORDON BYRON, 6TH BARON BYRON, *Childe Harold's Pilgrimage*, *in* 2 THE WORKS OF LORD BYRON 400-01 (Ernest Hartley Coleridge & Rowland Edmund Prothero eds. 1899) (quoted with minor typographical differences in BULFINCH, supra note 5 at

In Wigmore, the American architect of modern privilege law, perhaps Lord Byron's question was answered obliquely. Here was no mind nourished in the wild, but rather one cultivated by the finer of American institutions, and uniquely set on championing the advancement of the nation, culture, and law. Suitable to such a paragon, he played his role both abroad and at home, in military and civilian positions, and as a practitioner and theorist of jurisprudence. If, as it seems, the invention as to the confidentiality requirement of privilege sprang Athena-like from his head, then it was a product of that most American nurture and innovative nature that inspired the Wigmore of our history books. It is difficult to compass a man of the law more thoroughly accomplished, though the examples of legendary judges often outstrip those who enjoy a more variegated career. There can be little doubt that the likes of Wigmore's juristic contemporaries in Harlan (*grand-pére et son petit-fils*), Holmes, Hand, Brandeis, and Frankfurter enjoy more storied academic testimonials as to their impact on the law. Yet Justice Frankfurter himself published a tribute to Wigmore on the occasion on his centennial, testifying to the value of the man, his work, and the sadness of his premature passing,[389] a tribute all the more remarkable given the two had feuded vehemently during Wigmore's lifetime.[390]

If Washington may have his apotheosis splayed across the Capitoline firmament, despite his grievous human sins,[391] perchance we may allow Wigmore his parthenogenesis without rebuke. As the many encomia to Wigmore both during and after his career testify,[392] there is no denying that he is a lofty figure in the firmament of legal science, worthy of a Capitoline installation himself.[393] This Article comes in the inverse posture of Marcus Antonius: not to bury Wigmore, but to praise him.[394] There is ample evidence over the past century that the requirement of confidentiality has proven a millstone around the neck of the law,[395] but Wigmore installed that unforeseen millstone in an effort to make sense of an incoherent tradition of evidentiary law, with his *novus organum*[396] to

18). In this passage, Lord Byron bewails the belligerencies of the Napoleonic Wars and the absence of effective resistance.

389. Frankfurter, *supra* note 228.

390. *See* Roalfe, *supra* note 228, at 280-81.

391. *See, e.g.*, Charles M. Blow, *Yes, Even George Washington*, N.Y. TIMES (June 28, 2020), at A21, www.nytimes.com/2020/06/28/opinion/george-washington-confederate-statues.html [perma.cc/U685-32S2]; Erica Armstrong Dunbar, *George Washington, Slave Catcher*, N.Y. TIMES (Feb. 16, 2015), at A17, www.nytimes.com/2015/02/16/opinion/george-washington-slave-catcher.html [perma.cc/3PPH-GF7Y].

392. *See* Roalfe, *supra* note 228, at 277 n.*.

393. *See, e.g.*, Frankfurter, *supra* note 228 (retired justice of the Supreme Court); Goldberg, *supra* note 228 (sitting justice of the Supreme Court).

394. *See, e.g.*, *supra* Section III-A; *cf.* WILLIAM SHAKESPEARE, THE TRAGEDY OF JULIUS CAESAR act 3, sc. 2, *ll.*73-78 ("Friends, Romans, countrymen, lend me your ears; I come to bury Caesar, not to praise him. The evil that men do lives after them; The good is oft interred with their bones; So let it be with Caesar.").

395. *See* Sunshine, *Failing to Keep the Cat in the Bag*, *supra* note *, at 645-67.

396. *See supra* note 255.

be based on a set of principles of legal science.[397] The functional impracticality of such an innovation could not have been known then, and indeed did not become fully apparent until the vast proliferation of documents occasioned by the photocopier and electronically stored information transformed discovery into a wholly different beast from when Wigmore wrote.[398] That unimaginable technological advances have made ruin of a single precept of Wigmore's promulgations of 1904 and 1905 is no indictment.[399] Conversely, however, acknowledging that Wigmore was a rare genius and a giant of his times does not mean his eminence should stand athwart the advancements of a century and more.[400] It is past time to accept Rice's exhortation to return to the long-tested common law of privilege as to confidentiality prior to Wigmore, as expressed in the very title of one of Rice's articles: "the eroding concept of confidentiality should be abolished."[401]

397. *See* WIGMORE, *supra* note 12, § 2291 at 3204.

398. *See* Sunshine, *Failing to Keep the Cat in the Bag*, *supra* note *, at 685.

399. *Cf. id.* at 808.

400. *See, e.g.*, *id.*, at 809 ("For all his inequable talents, Wigmore was only a waypoint, albeit a monumental one, towards the goal in view. The quest for a more perfect privilege balancing the supreme goals of privacy and truth will go ever on, as it has for centuries." (citations omitted)).

401. Rice, *supra* note 16 (majuscule letters reduced to minuscule).